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THE CHALLENGE OF CULTURE FOR THE RIGHTS OF WOMEN
IN AFRICA: A Critical Analysis of the Protocol to the African Charter
on Human and Peoples' Rights on the Rights of Women in Africa

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I do hereby declare that I have read and understood the regulations governing the submission of Masters of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

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ABBREVIATIONS

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

OAU – Organisation of African Unity

NGO – Non-Governmental Organisations

WILDAF – Women in Law and Development in Africa

NEPAD – New Partnership for Africa's Development

AU – African Union

ACGHRS – African Centre for Democracy and Human Rights Studies

FGM – Female Genital Mutilation

FC – Female Circumcision

HIV – Humane Immune Virus

AIDS – Acquired Immune Deficiency Syndrome

ICESCR – International Covenant on Economic Social and Cultural Rights

ICCPR – International Covenant on Civil and Political Rights

UDHR – Universal Declaration of Human Rights

ACHPR – African Charter on Human and Peoples' Rights

UN – United Nations

CHAPTER ONE

THE DEVELOPMENT OF THE RIGHTS OF WOMEN IN AFRICA

1. INTRODUCTION

The fight to entrench women's right as human right dates back to pre-colonial African societies. Poetry, fiction and non-fictional write-ups tell of heroic deeds of African women in a sexist social environment. Modern day issues that brought about the clamour for treaties like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) are only advancing the concerns for entrenching women's rights that started long ago.

Given this global recognition, with provisions in international human rights instruments which entrench and guarantee the equality of sexes, full dignity of the person; non-discrimination on the basis of sex; and freedom from cruel, inhuman and degrading treatment,¹ it could be expected that women can now enjoy their human rights. In practice, this is not so, and particularly in Africa, where the enjoyment of women's human rights remains elusive for the majority of African Women.

This has been primarily due to the extreme positions taken on the debate about whether the concept of human rights is universal or culturally relative. The situation is further compounded by low literacy levels, a lack of properly articulated rights, some cultural practices, and the recognition of customary law that give legal basis for some discriminatory practices. There is therefore the need for a search into the viability of finding a common ground between both extreme positions, which will in turn afford better protection of most women in Africa.

¹ See Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the African Charter on Human and Peoples' Rights.

Therefore, the crux of the matter in this essay is whether the African Women's Protocol on the rights of women in Africa has successfully addressed the balance between the concepts of universality and cultural relativity of human rights.

2. HISTORICAL OVERVIEW OF THE DEVELOPMENT OF WOMEN'S RIGHTS IN AFRICA

The African human rights system has since the 1980s gradually developed its own jurisprudence in the protection of Africans. Legal instruments of the African system largely ignored women's rights until recent years.² Because the 1963 Charter of the Organization of African Unity (OAU) made no mention of women, African nations subsequently designed the region's primary human rights document—the African Charter—in 1981 to protect state sovereignty.³ The African Charter specifically gives an African aspect to issues of human rights by addressing matters critical to Africa. It came into force on 21 October 1986.⁴

Apart from the general provisions in the African Charter that apply to all persons, article 18 has been devoted to; Inter alia, the family, women, children, the aged and the disabled. It ensures that the rights of women are promoted, realised and protected in order to enable them enjoy fully all their human rights as well as promoting and protecting the rights of African people in general. The Charter established the African Commission on Human and Peoples' Rights, which is responsible for enforcing the rights enshrined in the charter.

However, though the African charter recognises the importance of women's rights, it has been argued to have treated women's rights in a cursory and perfunctory manner, because not only is it the case that women are mentioned in only one provision, but

² Rachel Murray *Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa*, in *International Law: Modern Feminist Approaches* 253

³ Adrien Katherine Wing & Tyler Murray Smith 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* at 33, 58.

⁴ Roselynn Musa *Breathing Life into the African Union Protocol on Women's Rights in Africa* (2006) 10.

also, they are lumped together with other 'quite complex and controversial notions of the family, tradition and morality.'⁵

The African Union's (AU) foundation treaty, the Constitutive Act, in its aim to further promote women's rights, also included the 'promotion of gender equality' as a core principle of the new Union.⁶ In support of this principle, the African Union (AU), created the Women's Unit within the AU Secretariat. In addition, the AU focused on the position of women as connected to development issues. The AU's development program-the New Partnership for Africa's Development (NEPAD), also referred to women's rights in its mission statement and cites promoting gender equality as one of its primary objective.⁷ However, with all these programs of action put in place by the AU, women were still considered as subjected to inequalities both in law and in fact.

Thus, Non-Governmental Organisations (NGO's) such as the Women in Law and Development in Africa (WILDAF) and the African Centre for Democracy and Human Rights Studies (ACGHRs) sought to address this problem by lobbying for a legally binding gender instrument which would provide an alternative and stronger platform for women rights. Commissioners as well as a few NGO's representatives prepared a Draft Protocol in 1997.⁸

On 26 October 2005, the African Women's Protocol received its 15th ratification, therefore entering into force. This marked a milestone in the protection and promotion of women's rights in Africa, creating new rights for women in terms of international standards.

3. STATEMENT OF PROBLEM

Several factors have been adduced for the degrading position of women in the African society most of which can be traced to the patriarchal system being operated, and the gender insensitivity of not only the male folk but the entire society including the women who have been socialized to accept the inferior status.

⁵ Beyabi 'Towards a more effective guarantee of women's rights in the African Human Rights system', in R Cook (ed.) *Human Rights of women: National and International Perspectives* (1994) 258.

⁶ Constitutive Act of the African Union OAU Doc. CAB/LEG/23.15 (May 26, 2001) (transforming the Organization of African Unity into the African Union.

⁷ The New Partnership for Africa's Development (NEPAD) (Oct. 2001) available at <http://www.uneca.org/nepad/> [assessed 5th December 2007].

⁸ Murray (op cit note 2 at 262).

At the apex of the problem is the conflict between universality of human rights and cultural relativism. In the rights-based discourse, claims to traditional practices and cultural rights are mostly regarded as inconsistent with women's rights to equality and freedom from discrimination.⁹ This debate over the relativity or universality of human rights is one which actually distorts the problem, rather than illuminating the condition of women. There is thus need, though arguable, to try to find a minimum standard, for the protection and promotion of women's' rights in the African context. This would aim at reducing or perhaps eliminating the prevalent harmful traditional practices. While consensus may not be easily reached on what constitutes harmful traditional practices, a need remains to re-examine the barriers that make it impossible to interrogate harmful traditional and customary law practices, and there is also need to ask how those barriers can be re-conceptualised, with a view to eliminating them.

Culture has also, often been cited as a key single obstacle to the enjoyment of women's human rights, and thus a reason for the resistance from not only the community but in some cases also from women who are victims of these practices. The patriarchal attitude of African society also aides in accelerating the continuing disregard of women's rights. It therefore becomes increasingly clear and important for human rights activists who are working towards the realization of women's rights, especially in Africa, to recognize this on-going tension between women's human rights and culture and attempt to understand the relationship between the two. It is only in doing so that appropriate interventions will be put in place.

This calls for a balancing of difference and commonality, which however is no easy task. The human rights movement in general has often suffered from over – emphasizing one of these areas at the expense of the other. Rigid concepts of culture, coupled with formalistic notions of universality, have led to a false antagonism between human rights and cultural difference.

The African Women Protocol was enacted to address these problems and herald an era for change for the plight of women in Africa. Though acclaimed to have addressed specific problems and issues that have significantly hindered women's rights and

⁹ Christi van der Westhuizen *Gender instruments in Africa Critical perspectives, future strategies* (2005) 77.

well-being in the past, it is not flawless and has been variously criticised, mainly on grounds that it 'fails to ingrain African values into the discourse of women's rights.'¹⁰

Consequently, the African Women's Protocol has met with a brick wall in terms of acceptability by African 'male' leaders and similarly by the African women themselves which it seeks to protect. This resistance, to my mind, creates another problem for the effective implementation of women's rights in Africa. However, whether it clearly provides a balance between the dictates of culture and that of universal human rights, is not immediately clear.

The African Women's Protocol however comes a long way, and can generally be said to be a fair document. It is a good starting point for countries that want to address the problems facing women on the continent.

4. AIMS OF STUDY

This study attempts to explore an aspect to the fight for women's rights that has received some legal attention, however from quite a different perspective. It seeks to examine the manner and extent to which culture has been a major challenge to the promotion of the rights of women in Africa, whilst trying to consider how a balance can be achieved without ultimately sacrificing culture on the altar of international human rights protection, and vice versa. To achieve this aim the following form the specific objectives of this study:

- To critically examine the debate around the concepts of universality and cultural relativity, and how its present form has possibly affected the status of women in Africa. To finally provide a platform on which both concepts can interrelate in the effective provision of a better status for African women.
- To examine the notion of culture and its role in every society, together with its effect on women. Some traditional practices in most African societies will be examined, together with how both concepts of universality and cultural relativity have addressed them, and whether, if possible, a balance could be achieved in fostering a better status and protection for women in Africa. Are

¹⁰ Danwood M Chirwa 'Reclaiming (WO) manity: The Merits and Demerits of the African Protocol on Women's Rights' (2006) *Netherlands International Law Review* 95.

there traditional practices that are harmful in some contexts, but can be modified to promote women's rights? What are the processes involved? What are the standards for modification? What role if any, do state parties' play in the effective implementation of Women's rights in Africa? And how a balance can be struck ensure that culture is not sacrificed on the altar of women liberation.

- Some provisions of the African Women protocol as it relates to impact of culture on women will also be examined, giving reasons for the great resistance met by this instrument. Has the protocol afforded greater protection for African women? And has the African Women's Protocol been successful in achieving this balance between the concepts of universality and cultural relativity?

5. SIGNIFICANCE OF STUDY

Although every major human rights treaty contains an anti-discrimination provision that affirms the right of women to be treated equally, the notion that women's rights are human rights is a relatively recent one. It was first discussed in 1993 at the International Human Rights Conference that took place in Vienna. A number of gender specific instruments have also been promulgated to promote and protect women's rights, together with a lot of work being done by several women's rights activists on the African continent. But despite the international and regional recognition of the equality of women, women all over the world and especially in Africa are still subject to great hardships and inequalities.

There is no doubt that embarking on an agenda to empower women, especially in a patriarchal African society must be done with caution, so that we do not fall on the wrong side of age-old traditions and customs of our people.¹¹ Thus focus should be on changes which preserve the obvious forms of pro-women institutions while radically transforming the substance.¹²

¹¹ Aina et al 'Better Life for Real?' (March 16 1990) *The African Guardian Lagos* at 19-24.

¹² Amadu Sesay and Adetanwa Odebiyi *Nigerian Women in Society and Development* (1998) 8.

It thus goes without saying that, though various contributions have been made on how best to ensure the protection of women's rights in Africa, more work and maybe a new approach needs to be explored.

6. RESEARCH QUESTION

How can the basic international rights of women be balanced with their cultural obligations and identity in the fight against discrimination of women in Africa?

7. LITERATURE REVIEW

Much of the literature analyses cultural practices in Africa as it affects women, and arguments abound as to their being a violation of the rights women, with so much clamour both internationally and regionally, for their complete eradication.

Akua Kuenyehia conducts a comparative analysis of several societies in West African countries, in discussing specific areas of law that affect women's life. Various aspects of customary law is analysed with some case studies provided on how the law has always been interpreted in a discriminatory manner against women. The author then concludes by trying to lay the foundation for further work, by providing evidence of the need to reform laws and develop policies that will promote gender equity.

Johanna Bond takes the same position as the above author in the context of Women's Rights in Ghana, Uganda and Tanzania. The author however concludes by admonishing states to attempt to strike a balance to ensure that culture is not sacrificed on the altar of development and emancipation.¹³ But calls for a new development model that would recognize the positive, non-discriminatory aspects of culture and that would specifically involve men and traditional Chiefs in the struggle for women's rights.

The Unit of Gender Research in Law University of South Africa, also analyses the position of women in typical African context, and tries to establish how cultural norms and values do play a pivotal role in shaping women's position. The author concludes by trying to find ways of informing African women of their rights and

¹³ Johanna Bond *Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania* (2005) 390.

choices, whilst showing them how best these rights can be utilised in the typical African context in which they live.

Corinne A.A Packer was also a very useful literature, as it tries to review existing literature on traditional practices and human rights violations. It shows how these literatures could be misleading as they describe all traditional practices as harmful. It outlines how certain Western challenges of certain traditions in Africa, has led to numerous reactions, and then calls for research into the most effective strategies that could be employed to challenge harmful traditional practices in sub-saharan Africa.¹⁴

Being a relatively new instrument, there is a dearth of literature on the African Women Protocol. This is especially so with regard to its normative framework which the author pursues as the crux of the study. Few contributions will therefore be analysed.

The African Charter is the main instrument recognising and protecting the rights of peoples in Africa. It guarantees the protection of the family and within this protection prohibits discrimination against women.¹⁵ This provision has however been considered insufficient in its protection of women who make up the majority of Africa's population.¹⁶ The current author cannot agree more. The African Charter defines human rights in terms of discrete violations in the public realm, whereas most violations of women's rights occur in private relations.¹⁷ Its regime therefore does not serve to protect women from challenges such as that which CULTURE presents. As a protocol to the African Charter, the African Women's Protocol can be utilised to fill the gaps in the parent instruments.

A critical analysis of the African Women's Protocol will however give better insight on whether it has succeeded in filling in the gaps as required by its drafters. Chirwa¹⁸ applauds the African Women's Protocol for its significance in Africa, and for the way

¹⁴ Corinne A Packer *Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa* (2002) 94.

¹⁵ Art 18 African Charter.

¹⁶ WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights,' available at <http://wildaf.org.zw/news4.html> (accessed 25th December 2007). See also J Oloka-Onyango 'Beyond the rhetoric reinvigorating the struggle for economic, social and cultural rights in Africa' (1995) 26 *California Western International Law Journal* 1.

¹⁷ J Oder 'Reclaiming women's social and economic rights in Africa: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2004) 5 *ESR Review* 5.

¹⁸ Chirwa (op cit note 10).

it boosts the protection of women's rights on the continent by protecting a wide spectrum of rights in a manner that has not been articulated in previous instruments.¹⁹ He however argues that, though the African Women's Protocol has great potential to transform women's lives on the continent, it also provides raw materials for its own failure.²⁰

Roselyn Musa, Faiza Mohammed and Firoze Manji²¹ convincingly show that the Protocol serves as a great champion for the rights and freedoms that women in the African continent ought to be enjoying but which sadly, continues to be ignored. They try to provide strategies for garnering more ratifications as well as implementing the provisions of the Protocol.

I am in agreement with the above authors to the extent that the African Women's Protocol can be a useful tool for a better protection of women's rights in Africa. However, as to the practical realisation of equality and non-discrimination of women in gender relations in Africa, the tension between 'tradition' and 'rights' will have to be tackled. Whereas the articulation in international instruments is a much easier task to accomplish, the protection of women's rights in practice remains problematic.

As emphasised by some of the above authors, this paper aims at establishing the need for a balance, whereby practices that have negative effects on the health and life of women are eradicated-thus promoting their right to life, health and dignity, whereas those practices that have no such negative effect but are challenged just on the grounds of their distinct and alien features, be respected as the peoples' right to cultural identity. Emphasis will equally be made on the independent analysis of the current author.

8. RESEARCH METHODOLOGY

This study is informed by extensive deskwork. It is of a critical character and largely non-empirical. The primary sources used are: treaties, consensus documents, and legislation where appropriate. The secondary sources are: books, academic articles,

¹⁹ Chirwa (op cit note 10 at 95).

²⁰ Chirwa (op cit note 10 at 64).

²¹ Musa (op cit note 4).

journals and all related literature. In doing both, the author uses the internet and the library.

9. OVERVIEW OF CHAPTERS

The study is stratified into five chapters. Chapter one provides the background to the study. It also contextualizes the study and sets the paradigm. Chapter two explores the jurisprudence around the debate between the universality of human rights and cultural relativism, setting the jurisprudence around the debate as the base work into the study. It is mainly critical, pointing out the inadequacies of both concepts in their extreme form, with a few strengths in relation to confronting the challenges faced by women in Africa in the face of culture. A common ground is offered in fostering a better life and protection for women in Africa. Chapter three shows how culture, has been a strong explanatory variable in understanding the predominantly gender ideology in Africa. It analyses some cultural practices as they affect the rights of women, outlining the cultural justifications for their prevalence. It however concludes by offering a mode on which cultural identity could be balanced against the protection of the basic rights of women under it. Chapter four critically analyses the provisions of the Protocol as it addresses the challenges of culture, and whether it was successful in achieving a balance between the contentions of cultural identity and respect for universal human rights. It explores the possibilities for solutions under the transformative provisions of the African Women's Protocol and analyses how best the Protocol can be brought home and effectively used in the context of African cultural values and norms, whilst still not losing its framework. Chapter five offers a general conclusion of the whole study, and some recommendations to women's rights activists, to governments and to non-governmental institutions, which would assist in ensuring better effectiveness of the Protocol and greater compliance to its provisions.

CHAPTER TWO

HUMAN RIGHTS AND THE DEBATE BETWEEN UNIVERSALITY AND CULTURAL RELATIVISM

1. INTRODUCTION

A conceptual problem which inevitably arises in any study of culture and human rights, is the old debate about whether the concept of human rights is universal or culturally relative to each particular social context.²² While most writers tend to agree that the contextual cultural approach to human rights is the most appropriate means by which to promote universal recognition of the concept of human rights, some others think that this approach fosters a relativism that is opposed to the universal character of human rights. The arena of women's human rights in Africa specifically, has also been a domain which emphasizes the polemic of the relativist horn and the universalist horn.²³ This calls for a balancing wherein human rights can be implemented in culturally diverse contexts, whilst still recognising the importance of cultural differences and preserving the universality of human rights.

This chapter aims to critically examine the concepts of universality and cultural relativity, and how the current debate has possibly affected the effective realisation and implementation of a better status for women in Africa. An attempt is equally made to finding an equal ground on which both competing interests can effectively carry out their goals, whilst protecting the 'best interest' of the African woman.

2. THE CONCEPT OF UNIVERSALITY

2.1 Definition

Universality is best stated in the Preamble to the Universal Declaration of Human Rights (UDHR),²⁴ which proclaims the declaration to be a:

²² Bonny Ibhawoh *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria* (1999) 19.

²³ Denis Goulet 'In defense of Cultural Rights: Technology, Tradition and Conflicting Models of Rationality' (1981) 3 *Human Rights Quarterly* at 1-18.

²⁴ UN General Assembly Resolution 217A (III) 1948.

Common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

Universalism generally holds that there is an underlying human unity which entitles all individuals, regardless of their cultural or regional antecedents, to certain basic minimal rights, known as human rights.²⁵ Whereas, radical universalism on the other hand, holds that culture is irrelevant to the validity of moral rights and rules which are universally valid.

Donnelly Jack best summarizes the contemporary doctrine of the Universalist approach by putting forward the following conclusions:

- All humans have rights by virtue of their humanity;
- A person's right cannot be conditioned by gender or national or ethnic origin;
- Human rights exist universally as the highest moral rights, so no right can be subordinated to another person, or to an institution.

Donnelly reinforces the universal validity of this theory by demonstrating that it is increasingly the practice of States to accept it, through ratification of international instruments.²⁶

An indication of a seemingly global consensus on the issue may also be drawn from the final document of the UN Conference on Human Rights in Vienna, Austria, in June 1993, bearing the title 'Vienna Declaration and Programme of Action'.

Paragraph 3 hereof states that:

All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the

²⁵ Elizabeth M Zechenter 'In the Name of Culture Cultural Relativism and the Abuse of the Individual' (1997) 53 *Journal of Anthropological Research* 320.

²⁶ Jack Donnelly 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* at 400-419.

same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Flexibility of universal human rights and its possible relevance to diverse cultures is facilitated by the establishment of minimum standards, and the incorporation of cultural rights in instruments of human rights law. Within this framework, states have maximum room for cultural variation without diluting or compromising the minimum standards of human rights established by law.²⁷

However, rights advocates around the world continue to face daunting challenges that question the theoretical justification for universal human rights. These challenges come in the form of group rights, national sovereignty, cultural, and religious autonomy.

2.2 A critical analysis

Over the years, universalism has been challenged, primarily by non-Western States. As non-Western States faced mounting criticism for human right violations, they began asserting culture-based defences.²⁸ Relativists reminded Universalists that most non-Western states did not participate in the drafting of the UDHR because, as subjects of colonization, they were not members of the United Nations.²⁹ Relativists argue that the human right regime's assumption of universalism has a cultural bias, favouring Western norms, and this has led relativists to advocate alternative approaches.³⁰

The question of universality of human rights has however been approached by several legal scholars, and it is interesting to note that one may divide these opinions into

²⁷ Diana Ayton-Shenker *The Challenge of Human Rights and Cultural Diversity* United Nations Background note, available at www.un.org [assessed 23rd Jan. 2008].

²⁸ Holning Lau 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 *University of Chicago Law Review* XXX.

²⁹ Ibid.

³⁰ Steiner & Alston *International Human Rights in Context: Law, Politics, Morals* (1996) 187.

schools according to geographical and cultural boundaries, where the tendency towards a more radical universalism can be found among Americans.³¹

Donnelly, who carries out an in-depth discussion not only of the theoretical principle of universality but also of its counterpart, cultural relativity, states that rather than a universal approach, one should apply what he terms as 'weak cultural relativism', where culture is an important source without leaving out completely the aspect of universality.³²

One of the most prominent and serious investigations of the question of human rights' universality is carried out by Cassese. He establishes that the Universal Declaration, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, do establish human rights rules of a universal scope, but also claims that, since human rights are both conceived and observed differently, 'universality is, at least for the present, a myth'.³³ It is therefore interesting to note that while the American approach reflects a strong ideological stance favourable to universality of human rights, the Europeans base their conclusions more on the degree to which the universality is reflected empirically in the various instruments.³⁴

In contrast hereto we find another, and less radical, African approach by Quashigah who concludes that, 'since societal development has never been universally in pari materia, human rights contents which are specific ideas rooted in certain social facts of the particular societies cannot be expected to be universal', while at the same time acknowledging that certain basic human needs are 'indisputably universally ascribable to persons of every historical and cultural background'.³⁵

It is also argued that, in a number of non-western cultures, individuals are not accorded rights in the same way as they are in the West. For example, in Africa, it is the community that protects and nurtures the individual. They argue that in most

³¹ Lone Lindholt *Questioning the Universality of Human Rights* (1997) 26.

³² Donnelly (op cit note 26).

³³ Antonio Cassese *Human Rights in a Changing World* (1990) 5.

³⁴ Lindholt (op cit note 31 at 27).

³⁵ Quahigah Kofi 'The Philosophical Basis of Human Rights and its Relation to Africa' (1992) *Journal of Human Rights Law and Practice* vol 1 no. 3/ vol 2 nos. 1 & 2, Nigeria.

African societies, group rights have always taken precedence over individual rights, and political decisions have been made through group consensus, not through individual assertions of rights.³⁶

These cultural differences have practical implications. For example, rights promoting equality of sexes are a contentious case in point. How critics demand, can women's rights be universal in the face of widespread divergences of cultural practices, when in many societies, for example, marriage is not seen as a contract between two individuals but as an alliance?³⁷

And inseparable from the issue of tradition is the issue of religion. For religious critics of the universalist definition of human rights, nothing can be universal that is not founded on transcendent values, symbolized by God, and sanctioned by the guardians of the various faiths.³⁸ This also poses a great challenge to a universal concept of human rights.

To sum up, all these approaches bridge a span ranging from intentions towards an ideal absolute universalism to a purely relativistic view. The majority of the sources, however, adopt an approach which on the one hand recognises that universality exists to some extent, at least in relation to basic human rights concepts and principles, but that some space must be left open to allow for cultural and other adaptations hereof.³⁹

Therefore, while we uphold that human rights must in their essence conform to the framework already defined and established in international law, we must at the same time accept, and even appreciate, cultural diversity which serves to adopt human rights effectively to the circumstances under which they operate. Only then can human rights be of benefit to the African woman (man).

³⁶ Shashi Tharoor 'Are Human Rights Universal?' (1999/2000) XVI *World Policy Journal*.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Lindholt (op cit note 31 at27).

3. CULTURAL RELATIVISM

3.1 Definition

Relativism rests on the notions of moral autonomy and communal self determination. It argues that a human person is not separate from, or above, society. Since societies vary from culture to culture, evaluations are relative to the cultural background out of which they arise. That view is supported by the argument that different cultures espouse different philosophies and values concerning the human condition and so there cannot, therefore, be a commonly or uniformly applicable theory of human rights.⁴⁰ Chris Brown states this position forcefully:

It is implausible to think that rights can be extracted from liberal polities, decontextualised and applied as a package worldwide. This is not simply because of international value-pluralism; it is decontextualisation that is critical whether international or domestic.⁴¹

The most valuable feature of cultural relativism was, and still is, its ability to challenge the presumed universality of standards.⁴² Cultural relativism sought not only simply to demonstrate that standards of morality and normalcy are culture-bound but also to call into question the ethnocentric assumption of western superiority.⁴³

The positions of cultural relativists vary widely. In its most extreme form, we have radical cultural relativism which holds that culture is the sole source of the validity of a moral right or rule. Weak cultural relativism on the other hand, holds that culture may be an important source of the validity of a moral right or rule.

A number of variations of relativist argument can be identified.⁴⁴ First, that since civilizations and cultures varies both in time and geographical location so too will their life-worlds vary. On this basis, international human rights standards are simply

⁴⁰ Malcolm Evans and Rachel Murray *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) 221.

⁴¹ Chris Brown 'Universal Human Rights: A Critique' (1997) 1 *International Journal of Human Rights* 49.

⁴² Alison Dundes Renteln 'Relativism and the Search for Human Rights' (1988) 90 *American Anthropologist* 58.

⁴³ Ibid.

⁴⁴ Evans (op cit note 40 at 221).

European or Western norms which are being imposed upon all other contemporary cultures for all time.⁴⁵ A second variation of this idea is that, even if it were to be agreed that there are some human rights norms which have universal acceptance, it would be impossible to attach similar value and weight to them irrespective of location and circumstance.⁴⁶ Thirdly, although there are some human rights norms that do have universal acceptance, others are negotiable in the light of the prevailing cultural, historical or other values applicable at any given time or place.⁴⁷ Fourthly, in any event, the nature of society and the world is such that there is a multiplicity of cultures and values and these have to be respected since they provide an essential starting point for any understanding of societal norms.⁴⁸ There is therefore a need to value difference, and realise that each culture has its own way of interpreting and understanding universal norms which must be viewed only in broad terms.

Cultural relativism is thus based on the idea that there are no objective standards by which others can be judged, and this position frequently leads to the assertion that traditional culture is sufficient to protect human dignity, and that therefore, universal human rights are not necessary.⁴⁹ In its complete sense, cultural relativism is often used to support the position that a particular articulation of human right, even those of the most basic of rights may be incompatible with cultural observances of other societies, and hence unacceptable.⁵⁰

3.2 A critical analysis

The concept of cultural relativism has been challenged on various grounds. The first level of criticism of the use of cultural relativism as an exception to universal norms, lies in the fact that bringing forward culture at a given time is to fundamentally ignore the dynamic and fluid nature of culture. Scholars have noted that culture is

⁴⁵ Evans (op cit note 40 at 221).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Evans (op cit note 40 at 221).

⁴⁹ Ayton-Shenker (op cit note 27).

⁵⁰ A Belden Fields and Narr WolfDieter 'Human Rights as a Holistic Concept 14 (Feb. 1992) *Human Rights Quarterly* 1-20.

neither static nor monolithic.⁵¹ Rather there exists divergence within every major culture and those dynamics are fluid over time. Cultural relativism however, adopts a static definition of culture: a snapshot of a group of people and their assumption that they will not change.⁵²

Cultural relativism admonishes us to respect traditional cultures but tends to gloss over the fact that even in the most egalitarian and non - stratified of societies, there is no such thing as one culture. Instead, all cultures always have constituted of groups and individuals with conflicting agendas, and their customs have reflected the interests of the dominant classes.⁵³

Cultural relativists are correct in pointing out that by endorsing or rejecting a foreign custom, one risks an imposition of one's own cultural prejudices on others. They are also correct in emphasizing that upbringing and education bring with them inherent biases. But the beliefs that judgments of other cultures must be avoided altogether because they may be ethnocentric, is illusory. One simply cannot avoid making judgments when faced with oppression and brutality masquerading under the guise of cultural tradition.⁵⁴

Cultural relativisms most fundamental weakness in the work towards human rights lies in the conflict of interest between the people who articulate the argument, and those they represent. More often than not, cultural relativism is claimed by repressive regimes whose practices have nothing to do with local or indigenous cultures, but more with their own self-preservation.⁵⁵

Relativists have also claimed that some human rights concepts are also found in most traditional societies.⁵⁶ Tevoedjre claims that before the European partition of Africa in the late 19th century, 'Africa maintained a set of rights and duties for its peoples,

⁵¹ See for example Donnelly (op cit note 26) (cultures are complex, variable, multivocal, and above all contested. Rather than static things, 'cultures' are fluid complexes of inter subjective meanings and practices.)

⁵² Ibid.

⁵³ Zechenter (op cit note 25 at 336).

⁵⁴ Ibid.

⁵⁵ Donnelly (op cit note 26).

⁵⁶ Albert 'Human Rights and Democracy in Africa' (1986) *Annual Lecture Series 2*.

which were substantially in tune with the concepts of natural law and the dignity of man'.⁵⁷ This may be a correct assumption, but at the same time, though arguably, it does not seem possible to establish on this basis, the existence of a distinct African concept of human rights, in the sense that the identification of a common streak of features is not sufficient in itself.⁵⁸

The sum of these arguments is that the dominant African conception of human rights combines a system of rights and social obligations which gives the community cohesion and viability.⁵⁹ This contrasts Western conception of rights which conceives rights in terms of abstract individualism without corresponding duties. Thus, African notions of human rights are inherently different from the western concept and a blanket application of Western principles to African and other non-Western conditions is unjustifiable.⁶⁰

The conflict between the universality of human rights and cultural relativism also makes itself felt in the field of women's human rights. In the rights-based discourse, claims to traditional practices and cultural rights are mostly regarded as inconsistent with women's rights to equality and freedom from discrimination.

The central obstacle to the achievement of women's human right as is argued seems to be the presence of a culturally relativist dogma. Reza Afshari⁶¹ identifies what she calls 'the most uncompromising' relativist stance according to which 'local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society'. According to Afshari, this position espouses the view that culture is the supreme ethical value, more important than any other. Therefore, human right in particular, should not be promoted if its implementation might result in a change in a particular culture. States therefore reject universal human rights, justifying this on the basis of cultural relativism, arguing that all cultures are particular, and there is no such

⁵⁷ Ibid.

⁵⁸ Albert (op cit note 56).

⁵⁹ Ibhawoh (op cit note 22 at 21).

⁶⁰ Ibhawoh (op cit note 22 at 21).

⁶¹ Reza Afshari 'An Essay on Islamic Cultural Relativism in the Discourse of Human Rights' (1994) 16 *Human Rights Quarterly* at 235-76.

thing as a universality of principles.⁶² For rigid cultural relativists, women's rights are a non-issue since the ostensible subordinate position of women is one aspect of 'traditional' culture.⁶³

Thus, the universality of human right standards for women has been held by cultural relativists to be inapplicable, as different cultural traditions and communities diverge in their understanding of human values, as well as of women's status in society.⁶⁴ For this reason, the argument goes, cultural laws should determine what kind of rights women would have, and this consequently allows for the persistence of gender inequality.⁶⁵ The long term result of this position will then be one of 'false consciousnesses, where the willingness for change for many women in Africa, will be influenced and suppressed by the so called requirements of cultural laws'.

However, it is important to note that the governments rejecting the universality of standards as Western, on the basis of cultural relativism, do so not only on the basis of cultural relativity, but for patriarchal reasons, amongst others.⁶⁶ Those rights discourses in which culture is invoked as an argument against universalism now largely belong to rulers, not to those who may need rights protected, who talk in terms of wrongs and needs, not rights and culture.⁶⁷

And herein lies the essence of the current debate: on the one hand, rights advocates assert that human rights should be universal, and that all cultures are ultimately malleable to the liberal interpretation of rights; On the other hand, cultural relativists insist that universalizing the concept of rights as articulated by rights advocates will be tantamount to a western hegemony, and a delegitimization of other cultures.⁶⁸ They argue that different societies should be allowed to define and promulgate rights to the

⁶² Afshari (op cit note 61).

⁶³ Adamantia Pollis and Peter Schwab *Human Rights: New Perspectives, New Realities* (2000) 14.

⁶⁴ M C Nusbaum & J Glover (eds) *Women, Culture and Development: A Study of Human Capabilities* (1995) at 407-426.

⁶⁵ Bilic Snjezana *Cultural Relativism, Universalism and Women's Rights* School of International Studies, University of South Africa 11.

⁶⁶ D Bell *East Meets West: Human Rights and Democracy in East Asia* (2000) Princeton, Princeton University Press.

⁶⁷ Mahmood Mamdani *Beyond Rights Talk and Culture Talk* (2000) 15.

⁶⁸ Rhoda Howard 'Cultural Absolutism and the Nostalgia for Community' (1993) 15 *Human Rights Quarterly* at 315-338.

extent that their cultures permit. There is therefore a need, where possible to find a common ground between this two competing concepts.

4. RECONCILING THE TWO APPROACHES

The effects of culture in shaping individuals are systematic and may lead to the predominance of the instinctive social types in different cultures. For example, there are important structurally determined differences between the modal 'natures' of women in modern Western and traditional Islamic societies. In any case, 'human nature' - the realized nature of real human beings- is a social as well as a natural product. Thus, the cultural variability of human nature not only permits, but requires significant allowance for some cross-cultural variations in human right. But if all rights rested solely on culturally determined social rules, as radical cultural relativism holds, there could be no human right- no right one has simply as a human being.⁶⁹

However, disagreeing with the content of what is now presented as universal does not have to mean that there are no values or norms universally agreed upon. Western values may not be universal as claimed, but this does not mean that universal values do not exist. Looking at the differing position as a whole, we do not face an either or choice situation between cultural relativism and universal human right. Rather, we need to combine the universality concept of human right and their particularity, and also accept a certain limited relativity for even universal human right. Rights that vary in form and in interpretation may still be 'universal' in an important sense of the normative universality. There may also be a weaker universality even in the midst of considerable substantive diversity- for example, if there is a large common core with relatively few differences 'around the edges'.⁷⁰

This according to An-Na'im will lead us to a level of conciliation that would embody a true cross-cultural search of what can be universally agreed upon. This could be achieved through internal cultural discourse and an intercultural dialogue, with a readiness from both sides (Western and non-Western cultures) to effect changes

⁶⁹ Donnelley (op cit note 26).

⁷⁰ Roberta Cohen 'Human Rights in Africa: Cross-Cultural Perspectives' 15 *Human Rights Quarterly* (1993) at 459-461.

where the need so arises.⁷¹ Internal discourse relates to the struggle to establish enlightened perceptions and interpretations of cultural values and norms. Cross-cultural dialogue should be aimed at broadening and deepening international (or rather intercultural) consensus. This effort, however, must be sensitive to the internal nature of the struggle, endeavouring to emphasize internal values and norms rather than external ones.⁷²

Universal standards would then be goals, while cultural legitimacy would offer a method of application. Roberta Cohen states that:

To adequately promote human rights, a careful study of the attitudes, beliefs, institutions and practices of the different cultures is indispensable in order to find ways in which local precepts can be applied to reinforce international human rights standards.

Therefore, the reconciliation of international standards with local cultural values will not undermine or weaken international norms, but will rather enrich and reinforce them. Moreover, worldwide support for human rights is likely to endure if human rights draw on elements from all cultural traditions.⁷³

Makau wa Mutua⁷⁴ also attempts to tackle this problem, by trying to align universal language of rights with the appreciation of the concrete African political and cultural environment in which such rights are to be applied. This requires that international norms should not be regarded as an invariable template but as minimum standards or a framework which permit further dynamic development and expression. Rights, as part of the fabric of society, must similarly reflect the changing values, perceptions and power relations within and between different worlds.⁷⁵

Similarly, all societies cross culturally and historically manifest conceptions of human dignity and human rights. If the notion of human right is to be a viable universal

⁷¹ Abdullahi An-Naim *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights* (1990) 31.

⁷² Abdullahi Ahmed An-Naim *Human Rights in Cross-Cultural Perspectives* (1992) 27.

⁷³ Roberta Cohen (op cit note 70).

⁷⁴ Makau wa Mutua *Human Rights Discourse: African Viewpoint* quoted in R Savio and D Reoch *Human Rights: The New Consensus* (1994) 99.

⁷⁵ Ibid.

concept, it will be necessary to analyse the differing cultural and ideological conceptions of human rights, and the impact of one on another.⁷⁶ Despite divergences in conceptions of what constitutes the substance of human dignity, there seem to be certain shared commonalities.⁷⁷

Justice Abdul Koroma, Judge of the International Court of Justice, acknowledges the charge that the Universal Declaration does not reflect African values and cultures, and that it propounds an individualistic view of rights.⁷⁸ However, he believes human rights have always been part of the African value system, and he goes on to say that the values and ethos in the Declaration have neither proved adverse nor injurious to the interests of the African people as a whole. And that all laws evolve, and are continuously shaped by interpretation, in order to enhance justice.⁷⁹ It would appear therefore that, although worded in Universalist terms, international human right norms are beginning to espouse the moderate version of relativism.

Cultural relativism must therefore be viewed as mutually interactive with universalism. All cultures contribute to the corpus of rights according to their own traditions and understandings. International standards are however important because they settle some key principles and set norms and standards. And yet national insights and experiences must continue to improve and perfect international standards, revise them or establish new ones as necessity determines. This is because these norms will only have value to the extent that they meet human needs. According to Mutua, there is need for an alignment of the universal language of rights with the appreciation of the concrete African political and cultural environment in which such rights are to be applied.⁸⁰ Therefore, international norms should not be regarded as an invariable instrument but as minimum standards or a framework which permit further development and expressions.

⁷⁶ Pollis (op cit note 63 at 60).

⁷⁷ Pollis (op cit note 63 at 60).

⁷⁸ A Koroma 'The Influence of the Universal Declaration of Human Rights in Africa- Fifty Years After Its Adoption- A Legal Perspective' (1998) *Africa Legal Aid Quarterly* 6.

⁷⁹ B Ajibola 'Problems of Human Rights and the Rule of Law' (July – Sept 1997) *Africa Legal Quarterly* 25.

⁸⁰ Mutua (op cit note 74).

Furthermore, the concept of cultural relativism should not be an obstacle to achieving equality for women. Many states for instance, uphold patterns of conduct which they deny are disadvantageous to women. They claim that ‘the attitude to women reflected in such patterns of conduct is essential to the social, cultural, religious or other character and integrity of their countries’.⁸¹ Women then become the repositories of culture- that is, the vehicles through which a fixed and homogenous notion of culture is symbolically expressed.

It must be emphasised that, cultural relativism is not a contradiction of universality. It is a response to the cultural domination of the west around the world and to globalization.⁸² Cultural relativism means preserving and defending cultures in the name of dignity. It does not mean refusing to allow any type of critique, or using culture to keep part of the population subjugated.⁸³

Therefore, though both positions in their extremist position, could be of little or no benefit to the people they aim to protect, a balance could be arrived at, where universal goals are not sacrificed on the altar of cultural diversity, and vice versa. As suggested by An-Naim, unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted.⁸⁴

It is however essential that the content of human rights, though founded on universal principles, has to bear what Makau Wa Mutua describes as the ‘African cultural fingerprint’ which emphasises the group, duties, social cohesion and communal solidarity as opposed to rigid individualism.⁸⁵

It must also be emphasised that there are substantive human rights limits even in well established cultural practices. Cultural practices which were acceptable in times past under a different social and historical context, cannot always be expected to conform

⁸¹ Diana Fox and Naima Hasci *The Challenges of Women’s Activism And Human Rights In Africa* (1999) 15.

⁸² Francoise Nduwimana ‘Universality and Cultural Relativism’ (June 13 2003) *Human Rights Commission of Pakistan*.

⁸³ Ibid.

⁸⁴ An-Naim (op cit note 72).

⁸⁵ Mutua (op cit note 74)

to established modern orientations.⁸⁶ For example, while slavery and trials by ordeal had been acceptable in many societies in Africa as in other parts of the world, today these cultural practices cannot be justified on any grounds. The same applies to the practices of discrimination on the basis of sex.⁸⁷ Yet, cultural relativism is a fact of human rights discourse, which influences peoples' conception of rights and duties. To this extent, cultural differences may justify some deviations from universal human rights standards. However, cultural derogations from universal human rights standards must be founded on authentic cultural basis with adequate alternative provisions for guaranteeing basic human dignity where the cultural orientation itself falls short of these standards.⁸⁸

5. CONCLUSION

Cultural relativism is in itself a very arbitrary idea. Cultures are rarely unified in their view points on different issues. Similarly, universalism in its current state is obviously not the ideal solution. It is clear from the above discussion that one must view rights in a more dynamic and holistic mode. One must not only observe the interaction and interrelatedness of rights but one must also note that rights are best expressed and applied by balancing various rights claims.⁸⁹

In a final analysis, it is significant to note that the relativist versus universalist debates over the legitimacy and priorities of human rights can be misleading. They are useful for example, in so far as they highlight how notions of equality and collectivism can be, and have been used as excuses for arbitrary and authoritarian governance. But in the end, they risk obscuring the essential truths that must be taken into account if contemporary studies of human rights are to be objectively understood. As a dynamic process, the cultures and traditions of the world must compare notes and come to some agreement on what constitutes human rights.

The object of human rights discourse therefore should be the quest for a reasonable and balanced approach to human rights which recognises the universality of basic

⁸⁶ Ibhawoh (op cit note 22) at 23.

⁸⁷ Ibhawoh (op cit note 22 at 23).

⁸⁸ Ibid.

⁸⁹ Evans (op cit note 40 at 228).

human rights values and yet, the interplay between various cultural factors in the construction and constitution of human rights.⁹⁰ Cultural forms and structures will continue to differ among non-Western societies, between Western and non-Western societies, and in the West itself, but a consensus could also emerge on elements of a reconstructed minimal universal paradigm.⁹¹

The next chapter will analyse the impact of culture on women in Africa, some cultural practices that have been the subject of conflicts between the positions of the west and non-western societies, and suggest how, if possible, a common ground be arrived at wherein the groups right to culture is not sacrificed on the altar of the women's universal rights, and vice versa.

⁹⁰ Ibhawoh (op cit note 22 at 23).

⁹¹ Pollis (op cit note 63).

CHAPTER THREE

CULTURE AND ITS IMPACT ON THE RIGHTS OF WOMEN IN AFRICA

1. INTRODUCTION

In Africa, theoretical responses to the expanding human rights discourse, includes a general call for cross-cultural dialogue about human rights.⁹² As clearly expounded in the previous chapter, this dialogue may be helpful in bringing a lasting solution to the controversies surrounding women in African culture. The cross-cultural approach, however, is not an all-or-nothing proposition, but a viable point at which a change, if any, should start. While total agreement on the standard and mechanisms for its implementation is unrealistic in some cases, significant agreement can be achieved and ought to be pursued as much as possible. Recognising the right to culture as also expounded in most international human rights instruments,⁹³ does not mean that specific issues such as the amelioration of the status of women cannot be addressed without implying that an entire cultural heritage is to be overthrown.

There is therefore a need for the presence of some form of ‘flexibility’ and ‘adaptability’ of basic international universalistic goals, in trying to address a wide range of issues peculiar to the status of women in Africa. The success of this approach will depend quite heavily upon the relevant cultural assumptions and practices that prevail within a given society, though culture cannot always be permitted to play such a dispositive role.⁹⁴ Just as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights.⁹⁵

This chapter will analyse generally the impact of the notion of culture in African societies, and how far it goes in determining the belief system and the continued existence of some practices on the continent. A few practices that are claimed to be

⁹² Josiah A M Cobbah ‘African Values and the Human Rights Debate: An African Perspective’ (1987) *Human Rights Quarterly* 309-331.

⁹³ For example Article 27 of the Universal Declaration of Human Rights.

⁹⁴ Philip Alston *The Best Interest of the Child: Reconciling Culture and Human Rights* (1994) 20.

⁹⁵ Ibid.

inconsistent with human rights will be analysed, stating the cultural justifications for their continuing existence, and analysing how reconciliation can be arrived at between the extreme dictates of culture and that of international human rights laws.⁹⁶

2. DEFINITION OF CULTURE

In its widest sense, culture can be defined as the ‘totality of values, institutions and forms of behaviour transmitted within a society, as well as the material goods produced by man (and woman).’⁹⁷ According to An-Na’im, culture is the source of the individual and communal worldview. It provides both the individual and the community with the values and interests to be pursued in life as well as the legitimate means for pursuing them.⁹⁸ It stipulates the norms and values that contribute to people’s perception of their self - interest and the goals and methods of individual and collective struggles for power within a society and societies.⁹⁹ As such, culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experiences of the community.¹⁰⁰

Generally, each society delineates between what men ‘do’ and what women ‘do’ and the rewards which accrue to them respectively in terms of ‘power’, ‘wealth’ and ‘prestige’. However, these social arrangements in terms of status and roles are not static; rather they have been undergoing changes in the face of colonization, industrialization, and urbanization.¹⁰¹

Religions also, often represent a culture’s ethics, values, explanations for existence, relationship to the environment, and relationships and responsibilities to members within and outside the community.¹⁰² Religions and belief systems are of fundamental importance for most people, forming part of their identity.

⁹⁶ The instruments to be considered will include: The Convention on the Elimination of All Forms of Discrimination Against Women, The Convention on the Rights of the Child, The African Charter on Human and Peoples’ Rights.

⁹⁷ Roy Preiswerk ‘The Place of Intercultural Relations in the Study of International Relations’ (1978) *The Year Book of World Affairs* 251.

⁹⁸ An-Na’im (op cit note 72 at 23).

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Sesay (op cit note 12 at 3).

¹⁰² Elsa Stamatopoulou *Cultural Rights in International Law* (2007) 109.

Cultural traditions also serve as devices designed to protect those at risk in society, including women, minorities, the elderly, the disadvantaged and children. Unfortunately, many practices originally intended to protect women and the girl-child has become an obstacle to their empowerment and in the most extreme cases, threatens their health and survival. A Rao articulates this dilemma as follows:

No social group has suffered greater violation of its human right in the name of culture than women. Regardless of the particular forms it takes in different societies, the concept of culture in the modern state circumstances women's lives in deeply symbolic as well as immediately real ways.¹⁰³

It is striking that culture is much more frequently invoked in the context of women's human rights than in any other area of law. This could be attributed to the fact that women's rights are often defined in relation to their roles in the family. Therefore, the quest for women's rights threatens patriarchy which, in a nutshell, perpetuates the inferiority status of women in society. To that end, the controversies are centred on the rights of women which are seen as a threat to cultural societal values.¹⁰⁴

3. GENDER AND CULTURE – THE RECIPROCAL RELATIONSHIP

In African contexts, gender is not only an ideological cultural construction, but a cultural practice that regulates the manner in which cultural behaviours are meted out towards women. In the words of Cheryl de la Rey:

Culture plays a large part in what we become. It helps us adapt to our environment, and it gives us a sense of continuity with our past. However, culture also functions to control and limit individual behaviour so that one conforms to the predominant values and norms.¹⁰⁵

Furthermore, the fundamental unit of all societies is the family. The family is usually the major source of the basic necessities of life and health; love and tenderness, adequate food, clean water, a place and time for rest, clothing and sanitation, to the

¹⁰³ A Rao *Women's Rights, Human Rights: International Feminist Perspective* (1995) 167-169.

¹⁰⁴ J Oloka-Onyango & S Tamale 'The Personal is Political? Or why Women's Rights are Indeed Human Rights: AN African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 715.

¹⁰⁵ De la Rey 'Culture, Tradition and Gender: Let's Talk about It' (1992) *Agenda 13* at 78-86.

extent made possible by socio-economic, cultural and environmental conditions.¹⁰⁶ Everywhere the basic family unit is the elementary nuclear family, a small domestic group made up of a husband, his wife, and their children; or where polygamy is a case, a husband and his wives forming a compound family; with frequently attached kin as well.¹⁰⁷ It is the universal group throughout Africa, with different forms and functions, tied in the form of descent known as kinship.

The basis of kinship in Africa as is the case elsewhere is descent from an ancestor. The most widespread descent group is known as the clan, which can either be patrilineal or matrilineal. The members of the former type of clan comprise all those who are born from a single founding ancestor through the male line only, while those of the latter comprise all those born from a single founding ancestor or ancestress through the female line only.¹⁰⁸ Patriliney is far more common in Africa than matriliney, which is limited mainly to parts of Zambia and Malawi, in central Africa, and to Ghana and Ivory Coast, in western Africa.

Regardless of the means of descent, authority in the family and elsewhere is always fundamentally held by men; therefore men have domestic authenticity in both patrilineal and matrilineal families.¹⁰⁹ It is worth noting therefore that gender relations in general, but particularly in Africa, are always patriarchal in nature and therefore necessarily male dominated.¹¹⁰ So whether in a matrilineal or a patrilineal community, men always impose themselves on women and insist on the subordinate status of women.¹¹¹ Although these traditional forms of family and kinship are lessening in importance, the strength of kin groups remains great, as they provide a sense of personal identity and security that is of high emotive value.¹¹²

¹⁰⁶ John Lawson 'Africa Family Structure' available at <http://www.jicef.or.jp/wahec/fu/217.htm> [accessed 18 February 2008].

¹⁰⁷ Introduction to Africa Family, Kinship and Domestic Groupings (2007) available at <http://www.everyculture.com/Africa-Middle-East/Introduction-to-Africa-Family-Kinship-and-Domestic-Groupings.htm> [accessed 18 February 2008].

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Flexon M Mizinga 'Marriage and Bridewealth in a Matrilineal Society: The Case of the Tonga of Southern Zambia' (2000) *African Economic History* at 53-87.

¹¹¹ Ibid.

¹¹² Ibid.

According to many cultural beliefs and stereotypes, women are not considered to be male equals but subordinates who must obey their husbands. An attempt to assert themselves may therefore be seen as a threat to the existing power relations and may be suppressed through physical violence or psychological means.¹¹³

4. WOMEN, CULTURE AND HUMAN RIGHTS

The rights of women in marriage and family matters are central to their rights as individuals. Nevertheless, the assurance of rights for women in this most personal of spheres is a complex matter, given that most societies in Africa, value the preservation of the family as much as they purport to value individual freedom.¹¹⁴ But if a woman is the linchpin of the family, can her rights be considered more important than those of the larger group? In Africa where extended families predominate and marriages are usually a matter of lineage concern, this question is even more pressing than it is in areas where the nuclear family prevails. Various customs and practices, most of which contravene United Nations provisions for human rights, are central to the organization of society.¹¹⁵

Furthermore, dichotomies between the universalists and relativists are perhaps nowhere more apparent than when addressing the issue of human rights of women and the socially, culturally and religiously prescribed and adhered roles of men and women.¹¹⁶ The argument usually made when a traditional norm or practice is condemned internationally is primarily based on the fact that one cannot adequately judge a society's cultural practices from outside the culture because he or she is not capable of fully understanding the practices unique to it.¹¹⁷ Implied in such assertions is the impossibility of judging another society's peculiar practices as good or bad precisely because they are peculiar to a foreign culture.¹¹⁸ On the other hand, the argument is maintained that all human rights (women's rights inclusive) are applicable universally, irrespective of the culture or society that one belongs to.

¹¹³ Hope Bagyendera Chigudu 'Characteristics of a Good Wife' *ARISE*, Oct.-Dec. 1991.

¹¹⁴ Rhoda E Howard *Human Rights in Commonwealth Africa* (1986) 195.

¹¹⁵ Ibid.

¹¹⁶ Packer (op cit note 14 at 81).

¹¹⁷ Packer (op cit note 14 at 101).

¹¹⁸ Ibid.

With both positions refusing to bulge from their stance, it is argued that the best position to take regarding this dilemma will then be one of ‘weak’ cultural relativity.¹¹⁹ In which case, a sensitive understanding of the meaning and value of custom would temper any imposition of universal norms of human rights that, although philosophically valid, are not yet fully accepted by ordinary people (as opposed to the ruling class) in a society. This position will not be used to deny the existence of any right in principle, but be used to modify its implementation so as not to offend the basic integrative norms of a society, as long as it is understood that those norms may well change, thus requiring the full implementation of a right under dispute at a later date.¹²⁰

An-Na’im and Donnelly respond to this problem by proposing that it is exactly the universal character of human rights that enables mankind to assess, even across cultures, what does or does not constitute a violation of human rights. An-Na’im as stated in the previous chapter, suggests that:

...cross-cultural evaluations, which are unavoidable for any international effort to protect and promote human rights, are most effective when based on universal human values. The more it can be shown that a particular human right is based on a value or norm accepted by the widest range of cultural traditions, the less the efforts to protect and promote that right will be open to charges of ethnocentricity or cultural imperialism.¹²¹

It follows from this logic that a cross-cultural evaluation can identify values and norms which are not accepted by the widest range of cultural traditions and which are contrary to human rights. The customs and practices that are unnecessarily harmful to the health of individuals and are preventable will then be easily identified and condemned.

To this extent, it is my belief that international communities’ condemnation of some cultural practices in Africa should not be branded imperialist, supremacist or colonialist. Especially where these practices do not in themselves have any negative

¹¹⁹ Donnelly (op cit note 26 at 400-419).

¹²⁰ Howard (op cit note 114 at 196).

¹²¹ An-Na’im (op cit note 72 at 343).

effect on the women, but are just peculiar to African cultures, it will amount to a breach of the right to culture where attempts are made to condemn or eradicate them.

If a total change will be achieved in ameliorating the present status of women in Africa, then both the international community, and women rights' activists at the regional and national levels, must understand the need to arrive at a balance between the struggle for the promotion of women's international and individual rights, and the equal need for respect of cultural identity and distinction.

As argued in the previous chapter, both positions in their extreme form do not serve any good. Therefore a few cultural institutions and practices will be examined in relation to their effect on women, with the aim of addressing the conflict and finding a common ground on which both can interrelate and more effectively carry out their goals towards the provision of a better status for women. The cultural practices to be examined below are prevalent in both patrilineal and matrilineal societies in Africa, though to a greater extent in some than in others.

4.1 Female Genital Mutilation/ Circumcision

4.1.1 Definition

Female genital mutilation (FGM) is the collective name given to several different practices that involve the cutting of female genitals.¹²² Another more embracing definition, which was adopted by the WHO, UNICEF and UNFPA in 1997, defines FGM as comprising 'all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons'.¹²³

There exist different types of FGM namely, clitoridectomy, excision, and infibulations or phraonic circumcision.¹²⁴ Clitoridectomy involves an operation where the clitoris is removed.¹²⁵ It is estimated that approximately 85 per cent of the women

¹²² Nahid Toubia *Female Genital Mutilation: A Call for Global Action* (1993) 9.

¹²³ World Health Organization *Female Genital Mutilation: An Overview* (1998) 6.

¹²⁴ C M Obermeyer 'Female Genital Surgeries: The Known, the Unknown, and the Unknowable' (1999) Vol. 13 *Medical Anthropology Quarterly* at 79-106.

¹²⁵ Packer (op cit note 14 at 17).

who undergo FGM go through this type and experience complications of a physical, sexual and psychological nature.¹²⁶ Excision is the removal of the clitoris and the labia minora (small, inner lips of the vagina).¹²⁷

Infibulation or ‘phraonic’ circumcision is the most extreme of these operations and involves the removal of the clitoris, labia minora, and parts of the labia majora (large, outer lips of the vagina).¹²⁸ The remaining skin of the labia majora is then scraped to form raw surfaces and stitched together with thorns.¹²⁹ The wound is further kept together by binding the woman, with pieces of cloth made into a rope, from thigh to ankle for several weeks to enable scar tissues to form, covering the urethra and most of the vagina. A small aperture, the size of the ‘head of a matchstick or the tip of the little finger,’ is left open for the flow of urine and menstrual blood.¹³⁰ Complications associated with infibulations are more severe. The women’s vagina has to be reopened every time she gives birth and restitched after child birth. In some communities, she may also be opened for the purposes of sexual intercourse, depending on whether she can dilate or not.¹³¹

4.1.2 Forms of the practice

FGM usually takes place in a secluded location outside the village (such as near a river, under a special tree or in a secret bush). Girls living in the city are brought back to villages specifically to have the circumcision performed according to the tradition of their ancestors.¹³² FGM is usually performed by unskilled ‘traditional surgeons,’ such as an old woman of the village.¹³³ The ‘surgeons’ use non-sterilized razor blades, iron knives, pieces of cut glass, or other home made tools.¹³⁴ In many cases, the person performing FGM will perform the ritual on a number of girls at the same time, increasing the risk of infection. Although the specific procedure and its symbolic meaning varies among communities, FGM is said to reflect the community’s efforts

¹²⁶ Toubia (op cit note 122 at 10).

¹²⁷ Ibid.

¹²⁸ Bond (op cit note 143 at 279).

¹²⁹ Ibid.

¹³⁰ Toubia (op cit note 122 at 10).

¹³¹ Ibid.

¹³² Packer (op cit at note 14 at 22).

¹³³ Efua Dorkenoo & Scilla Elworthy *Female Genital Mutilation: Proposals For Change* (1992) 7.

¹³⁴ Packer (op cit note 14 at 22).

to control a woman's (or a girl's) sexuality, leaving her susceptible to a myriad of devastating health problems, including HIV infection.¹³⁵

Traditionally the FGM procedure was performed by women, a role inherited or learned from a relative.¹³⁶ For these traditional circumcisers, the role bestows on them respect and control in their communities, which in turn makes them look upon themselves as custodians of their culture. For example, in Sierra Leone, circumcisers are highly respected women leaders who control the traditional secret societies, and are seen as priestesses.¹³⁷ This in turn accounts for the reasons why women themselves are the engineers behind the prevalence of this practice.

4.1.3 The rights it violates

In tracing the various discourses and attempts by the international community to promote the rights of women, one theme is recurrent; the recognition that the violation of women's and children's rights is of universal concern, and that FGM is but one of the many manifestations of violence against women.¹³⁸

The UN Special Rapporteur on violence against women has in fact argued, albeit briefly, harmful traditional practices like FGM constitute more than a simple violation of the principle of non-discrimination. She states:

...It seems painfully obvious that violence against women manifests itself in its possibly most blatant form through traditional practices affecting the health of women and children. Those culturally conditioned practices are not only dangerous to women's health, at times even resulting in their death, but also violate the basic human rights of women and seriously impair their dignity. Through the infliction on them of different forms of physical and mental violence throughout their life span, girls and women are denied their human right to be free and independent, and to live in a secure environment within their families, homes and communities.¹³⁹

¹³⁵ Dorkenoo (op cit note 133).

¹³⁶ Toubia (op cit note 122 at 29).

¹³⁷ Ibid.

¹³⁸ Laura Nyirinkindi 'Female genital mutilation as a manifestation of gender-based violence in Africa' available at www.chr.up.ac.za/centre_publications/gender/gender.html [accessed 13th February 2008]. Article 1 and 2 of the UN Declaration on Violence Against Women 1993.

¹³⁹ UN Economic and Social Council 'Preliminary Report Submitted by the Special Rapporteur on Violence Against Women' (1994) para 72.

FGM has also been criticised for violating children's right to life, survival and development, which are protected under the Convention of the Rights of the Child (CRC).¹⁴⁰ This is due to the health complications associated with the practice because of the unhygienic conditions under which it is conducted and the unskilled people that carry out the ritual. There is also the health hazards that result from the severe cuttings associated with some forms of this practice. The fact that the practice is done without their consent further aggravates the violation.¹⁴¹

Similarly, FGM carries the real potential risk to a woman's reproductive and general well-being. The fact that the practice by its very definition, threatens a woman's health implies that it potentially violates her right to health.¹⁴² With the prevalence of HIV/AIDS, women's right to life and health are put in double jeopardy.

It is further submitted that FGM violates a woman's right to freedom from discrimination, on the grounds that the practice is targeted 'primarily at women',¹⁴³ and as such is indicative of an inferior status attributed to them. However, while it can be convincingly argued that this practice carries the risk of physical harm to women, the argument that these also constitute discrimination against women is much more difficult to establish, and difficult for Africans to accept (especially since they are effectively carried out in the belief that they protect women).¹⁴⁴

The practice around FGM is also said to violate a woman's rights to freedom of thought, belief, opinion and expression. Although the majority of women tacitly consent to these practices, the reality remains that their opinion not to consent is essentially non-existent.¹⁴⁵ For instance, the ability of a young girl to refuse her parents' decision that she undergoes circumcision is often fictive. Culturally, she lacks the power to decide and demand otherwise. If she does insist otherwise, ostracism may result. She has few, if any, meaningful alternatives to escape from such

¹⁴⁰ Art. 6 of the Convention on the Rights of the Child.

¹⁴¹ Wolfgang Benedek *Human Rights of Women* (2002) at 274.

¹⁴² Benedek (op cit note 141 at 58).

¹⁴³ This is due to the fact that there are some cultures for example in South Africa, where the practice is targeted at boys and men.

¹⁴⁴ Packer (op cit note 14 at 63).

¹⁴⁵ Packer (op cit note 14 at 76).

severe result.¹⁴⁶ This is reinforced by her parents' claims to have a right to decide on matters of their child's upbringing. Nevertheless, it is clear that regardless of the rights of parents to decide matters of their child's upbringing, international human rights law clearly places a duty on the State to ensure that the best interests and well-being of the child remain the primacy consideration.¹⁴⁷

4.1.4. Cultural justifications for the practice

Despite the various attempts by the international community together with regional women's rights activists to eradicate the practice, it continues unperturbed. Several reasons have been adduced for its continuing existence.¹⁴⁸ These include the maintenance of tradition, the promotion of social and political cohesion, the fulfilment of religious requirements, the maintenance of feminine hygiene, the pursuit of aesthetics,¹⁴⁹ to reduce the woman's sexual urge,¹⁵⁰ and to prevent promiscuity, sexual deviance and excessive arousal.¹⁵¹

In some African tribes for example, such as the people of Northern Sudan, the Kikuyu of Kenya, the Tagouna of Cote d'Ivoire, the Efic of Nigeria, and the Bambara of Mali, female circumcision is a part of the initiation rites for development into adulthood, which also declares her readiness for marriage.¹⁵² In many African tribes, marriage continues to be the role envisaged for every woman. Therefore, the possibility of failure to get married because of one's inadequacy is a matter that has serious implications, not only for the girl/woman's status but also for her family.¹⁵³

Apart from initiation of the girl, there is also the issue of identity of the individual. Since FGM is usually carried out at a particular time of the year, and involves many

¹⁴⁶ Packer (op cit note 14 at 76).

¹⁴⁷ Article 3 of the 1989 Convention on the Rights of the Child and Article 4 of the 1990 African Charter on the Rights and Welfare of the Child.

¹⁴⁸ United Nations 'Harmful Traditional Practices Affecting the Health of Women and Children' (1996) 9

¹⁴⁹ Ibid.

¹⁵⁰ M U Mandura 'Female genital mutilation in Nigeria' (2004) 84 *International Journal of Gynecology Obstetrics* at 291-298.

¹⁵¹ Toubia (op cit note 122 at 37).

¹⁵² Dorkenoo (op cit note 133 at 14).

¹⁵³ Benedek (op cit note 141 at 273).

young girls in the same age group, there is the fear of losing the psychological, moral and material benefits of 'belonging', if one fails to undergo FGM¹⁵⁴

In some other communities, female circumcision is the traditional ritual that confers full social acceptability and integration into the community upon the females. In Akwa Ibom State and in villages in the Calabar area of Cross River State of Nigeria for example, women who have not undergone female circumcision face derision from other women who have undergone female circumcision. Female circumcision is seen as a prerequisite for acceptance as a member of an ethnic group and a woman's right to belong, contribute to, and participate in her community as a full member.¹⁵⁵

Similarly, the Egyptians and the people of Katiola in Mali believe that the clitoris is ugly and must be removed to make a woman clean.¹⁵⁶ Although these superstitious beliefs about female sexuality are biologically and factually incorrect,¹⁵⁷ and the harmful effects of FGM well documented, cultures that practice FGM hold onto their beliefs with tenacity, remaining ignorant of or overlooking factual inaccuracy, and its eradication proves difficult. In many of the communities practising FGM, proponents have argued that the practice is so deeply imbedded in the value system of the communities that its abolition is likely to be seen as an attack on the age-old respected cultural practices and beliefs of the communities.¹⁵⁸

It is therefore not difficult to understand why female circumcision continues unabated if one puts oneself in the shoes of, for example a Sudanese woman who has no education and who believes or has been brought up to believe, that her only goal in life is to marry, to satisfy her husband sexually and otherwise, and to bear him many children.¹⁵⁹ For such a woman, tradition plays a very important part in her life, and what she is told demands that she undergo female circumcision.

¹⁵⁴ Sesay (op cit note 12 at 273).

¹⁵⁵ 'What's culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision' (1993)

106 Harvard Law Review 1944 (hereinafter Culture).

¹⁵⁶ Dorkenoo (op cit note 133 at 14).

¹⁵⁷ Hanny Lightfoot-Klein *Prisoners of Ritual: An Odyssey Into Female Genital Circumcision in Africa* (1994) at 38-39.

¹⁵⁸ Benedek (op cit note 141 at 272).

¹⁵⁹ Lightfoot-Klein (op cit note 157 at 68-70).

Dahabo Elmi Muse, in her prize winning poem on female circumcision, speaks about the 'three feminine sorrows' her grandmother told her about: 'the day of circumcision, the wedding night and the birth of a baby.'¹⁶⁰ A rural woman is brought up to expect these three feminine sorrows and to see them as natural. It would therefore be difficult for her to believe otherwise.

However, some communities in Africa have begun to take cognisance of the serious health concerns associated with FGM, and thus begun to experiment with alternative rites of passage that do not involve genital mutilation but preserve the positive aspects of marking the transition to adulthood.¹⁶¹

4.1.5. Resolving the conflict

Female circumcision is a traditional practice which has become synthesized over time from various values.¹⁶² While acknowledging all the reasons noted above as independent factors, the practice can be summed up as stemming initially from women (and men) strictly in a bid to unquestionably comply with the dictates of tradition within their communities.¹⁶³ In other words, tradition exercises a powerful influence which obstructs efforts to limit or eradicate female circumcision. As suggested in the list of reasons given above, the practice may be considered necessary for reasons that have nothing to do with health but are crucial to the definition of a beautiful feminine body, the marriageable worth of daughters, the balance of sexual desires between the sexes or the sense of value and identity that comes from the traditions of a group.¹⁶⁴

The question to be asked therefore is, bearing in mind the health and life threatening risks associated with this practice, is FGM so crucial to group identity that performing the initiation rites without female circumcision or the cutting of the genitals would destroy group identity?¹⁶⁵ More importantly, the negative effects of this practice on

¹⁶⁰ Dahabo Elmi Muse 'Poem on Female Genital Mutilation' reprinted in Lula J Hussein et al 'Female Genital Mutilation: Reports on Consultations held in Ottawa and Montreal (1995) Department of Justice Canada.

¹⁶¹ Molly Melching *Abandoning Female Genital Cutting in Africa* (2001) 156.

¹⁶² United Nations (op cit note 148 at 10).

¹⁶³ O Koso-Thomas *The Circumcision of Women: A Strategy for Eradication* (1987) 69.

¹⁶⁴ Obermeyer (op cit note 124 at 92).

¹⁶⁵ Obermeyer (op cit note 124 at 92).

the girls and women are to my mind, far more grievous than the positive goals that the practice aims to achieve.

Ultimately, there is a need to arrive at a balance wherein the eradication of the practice is not forced on the people, as this will meet with great resistance. Instead, attempts should be made at trying to find a way of raising resistance to the practice from within the communities, by revealing the irrationality and dishonesty of the reasons put forward to maintain such custom.¹⁶⁶ Education of the harmful effects of FGM should be carried out, but this should be nondirective. It should not seek to force communities to end the practice, but should aim at helping communities to understand and try to change when they determine they are ready to do so.¹⁶⁷

On the other hand, provision could be made for an alternative programme, whereby the community is still able to keep its ideas and values associated with the practice, without the harmful elements of the practice. Kenya for example has started making attempts at this, as some communities have started adopting an alternative rite of passage in which they ‘circumcise’ their girls through words, known as ‘Ntanira na Mugambo’ in the local language of the Ameru a community on the eastern slopes of Mount Kenya. The rite brings ‘willing’ girls together for a week in seclusion where they get traditional lessons about their future roles as women, parents and adults in the community. It is just like the traditional ritual, except that there is no cutting of their genitals.¹⁶⁸ The community should however be included in the programme planning and implementation.¹⁶⁹ This I believe is a more viable approach at least for the meantime to seeing the negative consequences of the practice of FGM eradicated.

¹⁶⁶ Obermeyer (op cit note 124 at 92).

¹⁶⁷ S K Hellsten ‘Rationalising circumcision: from tradition to fashion, from public health to individual freedom-critical notes on cultural persistence of the practice of genital mutilation’ available at www.jme.bmj.com [accessed 28 January 2008].

¹⁶⁸ Frederick Nzwili ‘New Ritual Replaces Female Genital Mutilation’ available at www.fgm.org/chelala.htm/ [accessed 28 January 2008].

¹⁶⁹ Ibid.

4.2 Polygyny

4.2.1. Definition

The practice of polygyny is another practice found in most African marriages, though to a greater extent in patrilineal than in matrilineal societies. It is a feature in the African family system that allows men to have as many wives as they desire. It is considered a symbol of wealth and often cited as an example of male dominance. The more money a man has, the more women he will be able to pay bride price for, and the more wives he has, the more people will work for him, producing more food.¹⁷⁰ It has therefore become a status symbol for a man to have many wives.

4.2.2. Forms of the practice

As it is the prerogative of the husband to choose a polygamous marriage, the practice is commonly associated with women's low status and inequality within a marriage.¹⁷¹ This is particularly true when combined with the young age at which a woman may be chosen and made a wife, and the older age of husbands. This further contributes to poor husband-wife communication and perpetuates male dominance in marriage.

Furthermore, in a relationship where there is one man and two women, the status of the man and the women cannot be equal. The husband becomes the master and his wives compete for his favours. The man takes over the role of allocating resources in the home and the women are reduced to mere labourers. At the same time, because the family assets are pooled together under the man's control, the women lose what they produce individually and cannot claim it at the dissolution of marriage.¹⁷² A wife must share her husband with other women, yet she dares not breach fidelity to her husband lest she be shamed before family elders or made to appease her husband in derogatory ways. Although the husband enjoys a right to compensation by a man with whom his wife has sex, the mere allegation of adultery, even if unsubstantiated by a husband, means serious trouble for a wife.¹⁷³

¹⁷⁰ Bond (op cit note 13 at 247).

¹⁷¹ Boye et al Marriage 'law and practice in the Sahel' (1991) 22 *Studies in Family Planning* 20.

¹⁷² See Jacqueline Asiimwe 'Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses' (2001) 4 *Yale Human Rights and Development Law Journal* at 173, 174.

¹⁷³ Kwame Opoku *The Law of Marriage in Ghana* (1976) at 34-35, 60, 70.

4.2.3. *The rights it violates*

Though there is no provision in any United Nations or Organization of African Unity convention, or indeed in any International Women's Year recommendation that polygyny should be abolished; its continuance has been a matter of debate even among Africans.¹⁷⁴ Polygyny has been attacked as reflecting and, at the same time, intensifying the fundamental inequality between the sexes in African social systems.¹⁷⁵ It is claimed to violate several recognized women's rights. First, it is said to violate the fundamental right to equality of all persons and non-discrimination, which are recognized in international and regional human rights instruments.¹⁷⁶ By giving an exclusive right to the man to marry up to four wives in Islam and an unlimited number of wives under customary law, the rights of women to equality in such marriages is violated.

Secondly, Polygyny-related abuses on women violate their fundamental rights including security, freedom from torture and degrading treatment, freedom from discrimination and free consent to marriage.¹⁷⁷ Women are taught to submit to the authority of their husbands in any circumstances and are frequently subjected to injustice, humiliation violence, coercion and abuse.

Thirdly, polygyny in many cases turns to be the exploitation of women. It is often to the benefit of male sexual needs and social prestige, and it totally disregards what is important to women or whether wives are happy or not.

Polygamy may also exacerbates domestic violence by creating a home environment in which multiple wives compete for the affection and resources of one man, it comes with an atmosphere of jealousy and rivalry that naturally exists between co-wives, and leads to smaller shares of inheritance particularly if the husband in a polygamous marriage dies intestate.

¹⁷⁴ Howard (op cit note 114 at 197).

¹⁷⁵ Cynthia Bowman & Akua Kuenyehia *Women and Law in Sub-Saharan Africa* (2003) 34.

¹⁷⁶ See UDHR Art. 16; ICESCR Art. 10, CEDAW and ACHPR Art 2.

¹⁷⁷ Issa Tanre Arusha 'Tanzania: Women and Polygamy – A Controversial Issue' (Jan 2008) available at <http://Africa.com/stories/2008/210535.html> [accessed 20 February 2008].

With the prevalence of HIV/AIDS, polygamy also puts the women's right to health in jeopardy. Under Article 12 of the ICESCR, states parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Polygamy also affects women's right to life, particularly in light of increasing their vulnerability to infection with HIV/AIDS, arising from the husband's multiple partners, and because they have no right to insist on the husband's fidelity.¹⁷⁸

4.2.4. Cultural justifications for the practice

The arguments usually advanced for the practice can be categorized into four areas. The first one is the religious argument, which argues that Islam permits a Muslim man to marry up to four wives, provided the husbands fulfils the conditions in the Koran. Proponents of this argument perceive any attempt to regulate the practice as an unjustified attack on their rights to practice their religion.¹⁷⁹

In The Gambia for example, the polygamous privilege is regarded as an absolute, entrenched and fundamental right of every Muslim man. However, it is clear that these men misinterpret the Shari' a condition that states that 'a man is only allowed to marry up to four wives, provided he can treat them equally'.¹⁸⁰

The second is the cultural argument, which is to the effect that polygamy is natural to Africa and is deeply entrenched in African society. Underlying this is the argument that monogamy is a Western value and its 'imposition' on Africa would be an attempt to impose these values on the African community.¹⁸¹

The third argument is that polygyny is by choice, as parties in polygamous unions have a right to a marriage of their choice. It is also argued that polygyny benefits both society and women, in reducing the incidence of prostitution and ensuring that 'surplus' women and widows in society also get an opportunity to marry or remarry since there are more marriageable women than men,¹⁸² and by this also women are

¹⁷⁸ See Irene Martyniuk *Women in Ghana face Dilemmas* (1992) Institute for Research on Women.

¹⁷⁹ Benedek (op cit note 141 at 277).

¹⁸⁰ Kuenyehia (op cit note 175 at 35).

¹⁸¹ Benedek (op cit note 141 at 278).

¹⁸² Kuenyahia (op cit note 175 at 34).

relieved of some of the burdens of marital chores, as there are many other women around to help in the chores.¹⁸³

In rural areas polygyny is also said to reinforce labour in the fields and increases the number of children who would take care of the parents in old age.¹⁸⁴ Instead of employing workers, men would marry several women with whom they produce a multitude of children as a built in work force. In this regard, polygyny as argued enhances productivity. The larger a family the larger the portion of land they cultivate. It makes hunting more efficient, cattle rearing better organized and food production enhanced.¹⁸⁵

4.2.5. Resolving the conflict

A complete ban on polygyny will be difficult, if not impossible, to enforce.¹⁸⁶ It will also encourage men to enter into informal unions, which offers women little or no support under the existing laws. Similarly, the legal abolition of polygyny would result in hardship being suffered by women already in polygynous unions. On the other hand, despite the awareness of the problems inherent with Polygyny, many men are not ready to give it up.

Although the practice of polygyny continues, it is worth noting that a number of countries have undertaken reforms in this area, with varying levels of success. These include countries in Africa that have taken the bold steps to abolish the practice such as Tunisia and Cote d'Ivoire. Others have adopted a midway approach to limit the practice by imposing conditions on the husband to seek permission from courts or a recognized authority to marry a second wife, upon satisfaction of specified conditions; or by giving the wife a right to divorce upon showing that the second marriage has either made her suffer a material or moral injury or will lead to injustice¹⁸⁷ thereby increasing the perception of women as independent and capable persons, whose rights as individuals must be respected and protected.¹⁸⁸

¹⁸³ Benedek (op cit note 141 at 278).

¹⁸⁴ Arusha (op cit note 177).

¹⁸⁵ Arusha (op cit note 177).

¹⁸⁶ Bond (op cit note 13 at 216).

¹⁸⁷ Benedek (op cit note 141 at 279).

¹⁸⁸ Ibid.

But to what extent has these bans been of benefit to women at the local and grassroots level who are not aware of these laws? Therefore a polygynous contract between a man and women which makes both of the contracting better off should not be denounced or criticised, especially where it causes no prejudice to the society. African women, sometimes offer themselves into a marriage with a married man because they find it harder to remain single and endure the reproach, contempt, misconception and stigma of the family and the community. Polygynous marriages allow these women to gain respect and consideration in a society which strongly disapproves, condemns and rejects female celibacy.¹⁸⁹ A complete ban on it will equally provoke resistance from the women.

4.3 Child/Early marriage

4.3.1. Definition

Child marriage is defined as marriage of a child below 18 years of age.¹⁹⁰ Another term applied to child marriage is 'early marriage.' Early marriage is however vague and does not necessarily refer to children. Moreover, what is early for one person may be late for another.¹⁹¹

While child marriage affects both sexes, girls are disproportionately affected as they are majority of the victims.¹⁹² Their overall development is compromised, leaving them socially isolated with little education, skills and opportunities for employment and self-realisation.¹⁹³ Child marriage is not widely recognised as a violation of children's rights, and a lot of reasons have been given for its existence. Despite the seeming good justifications adduced for the practice, it is evident that this practice instead deprives girls of crucial opportunities available to their male counterparts, and contributes to the continued subordination of women.

¹⁸⁹ Arusha (op cit note 177).

¹⁹⁰ Article 1 of the Convention on the Rights of the Child.

¹⁹¹ Nawal M Nour 'Health Consequences of Child Marriage in Africa' (2006) *Emerging Infections Diseases* available at <http://www.cdc.gov/incidod/EID/vol12no11/06-0510.htm> [accessed 18 February 2008].

¹⁹² Ibid.

¹⁹³ Ibid.

4.3.2. *The rights it violates*

Since 1948, the United Nations and other international agencies have attempted to stop child marriage. Article 16 of the Universal Declaration of Human Rights states that persons must be at 'full age' when married and that marriage should be entered into 'freely' and with 'full consent.' In other words, a country that allows child marriage is committing a violation of human rights.¹⁹⁴ Article 16 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, also requires minimum ages for marriage to be specified and says that child marriages are illegal.¹⁹⁵ However not until 1989, at the Convention on the Rights of the Child, did international law define children as persons below 18 years of age.¹⁹⁶

Child marriage has been criticised as constituting violence against the girl child, to the extent that some girls may suffer physical abuse by their older, dominant husbands and that such abuse is often socially condoned. In most cases of early marriage, girls are also coerced by their spouses into having sex and they lack the social and physical power to refuse. In these instances of forced sexual intercourse, their rights to freedom from violence can again be said to be violated.¹⁹⁷

Another right violated by the practice of early marriage, is the right to education. In general, the expectation and unspoken rule in much of Africa is that young women who marry will not carry on their education.¹⁹⁸ The widespread of early marriage means that many girls have to stop their education at a young age regardless of their wishes, because they will be expected to take on their new duties as wives immediately following marriage. This firm societal expectations, obstructs a young girl's right to pursue her education, and thereby contributes to a violation of her right,

¹⁹⁴ United Nations. Universal Declaration of Human Rights available at <http://www.un.org/overview/rights.html> [accessed 18 February 2008].

¹⁹⁵ United Nations. Convention on the Elimination of All Forms of Discrimination Against Women available at [http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article 16](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article%2016) [accessed 18 February 2008].

¹⁹⁶ Office of the High Commissioner for Human Rights United Nations. The Convention on the Rights of the Child (Article 1) available at <http://www.ohchr.org/English/law/pdf/crc.pdf> [accessed 18 February 2008].

¹⁹⁷ R J Cook *State Accountability under the Convention on the Elimination of All Forms of Discrimination against Women* (1994) 229.

¹⁹⁸ Packer (op cit note 14 at 77).

and which consequently restricts her economic autonomy and often adversely affect her reproductive health.¹⁹⁹

It also criticised for violating the girls' right to health. Because they are physically under-developed and psychologically unprepared to cope with the demands of marriage, pregnancy, labour and nursing, thus married adolescents have higher lifetime risks to health and life.²⁰⁰ Among numerous psychological and physical dangers, a major health risk associated with pregnancy among girls is obstructed or prolonged labour because the baby's head is too big for the underdeveloped pelvis. This can result in maternal death or serious complications, the most disabling of which are obstetric fistulas.²⁰¹

Cases abound for example in the Northern part of Nigeria, where these young girls are made to marry at very young ages to much older men, and are thereafter made to face the ordeal of pregnancy and delivery. This subsequently leads to the destruction of their fragile pelvic, which makes them unappealing to their husbands' sexually. They are thereafter dumped in hospitals to await a surgery, which would possibly help reconstruct their pelvic area.

Child brides also suffer significant higher rates of HIV infection and unsafe abortions.²⁰² They are usually married to older men who have had more sexual partners, and the power dynamics are such that they can't negotiate with their partners about using contraception.²⁰³ Girls who give birth in their teens are also two to five times more likely to die in child birth, and infant mortality of their children is higher. This once again could be said to violate the girls' right to life.

Similarly, because girls are married off at an early age, often to older men, it is difficult for them to relate to their husbands on an equal basis in matters relating to

¹⁹⁹ Susanna Mikhail *Child Marriage and Child Prostitution*, in *GENDER, TRAFFICKING, AND SLAVERY* (2002) 43.

²⁰⁰ As reported by IAC Symposium for Legislators on the drafting of an African Declaration on Violence Against Women (1997) 4.

²⁰¹ As reported by IAC Symposium for Legislators on the drafting of an African Declaration on Violence Against Women (1997) 4.

²⁰² Kari Lydersen: *The Injustice and Injury of Child Marriage* (2006) available at <http://www.infoshop.org/news/article.php> [accessed 21 February 2008].

²⁰³ Ibid.

property. Many girls are married at puberty, and thus do not have the education, skills, and experience necessary to acquire employment. Young brides end up staying at home to look after the family, and those in villages spend most of their time engaged in agricultural work.²⁰⁴ Therefore, they have few chances to acquire and accumulate their own property.

Summing up, early marriage exposes the girls to early sexual activity, which comes with health risks associated with pregnancy and child bearing, and thereby extending the high-risk period over a girl's lifetime.²⁰⁵

4.3.3. Cultural justifications for the practice

Poverty plays a central role in perpetuating child marriage.²⁰⁶ This is the case where a family's only way to recover its investment in a daughter may be to have her married in exchange for the bride price. In some countries, the bride price decreases as the girl gets older, this may tempt parents further to have their daughters married at younger ages.²⁰⁷ These are not necessarily heartless parents but, rather, parents who are surviving under heartless conditions.

Other reasons given for early marriage include:

- Protecting the virginity of the girls for the honour of the family. The practice is seen as a protective mechanism against premarital sexual activity, unintended pregnancies, and sexually transmitted diseases (STDs). The latter concern is even greater in this era of HIV/AIDS.
- Strengthening and enlarging family bonds (e.g. when marriage occurs between cousins or kin). It forms new alliances between tribes, clans, and villages, and reinforces social ties, and stabilizes vital social status.
- Economic benefits (notably through dowry and reduction of family expenses on the married girl).²⁰⁸

²⁰⁴ World Bank 'Gender, The Evolution of Legal Institutions and Economic Development in Sub-Saharan Africa' (1992) 27.

²⁰⁵ L S Zabin and K. Kiragu 'The Health Consequences of Adolescent Sexual and Fertility Behaviour in Sub-Saharan Africa' (1998) 29 *Studies in Family Planning* at 215-218.

²⁰⁶ Nour (op cit note 191).

²⁰⁷ Ibid.

²⁰⁸ IAC (op cit note 200 at 48).

4.3.4. Resolving the conflict

Despite the numerous negative effects of child marriage as outlined above, and various efforts by international community to eradicate the practice, this practice still continues, primarily on grounds that family honour is tantamount in many cultures, and marrying off girls early is one way to avoid them becoming pregnant out of wedlock.²⁰⁹ Similarly, community customs regarding the appropriate age for marriage can exert a great deal of social pressure on parents to marry their daughters out at young ages. Therefore, embarking on a direct attempt to abolish this practice completely, could meet with great resistance. However, an equal problem arises on grounds of having to find how low one can safely go in determining the minimum age of marriage?

However, as shown in the above section greater harm than good is done to these girls, with equal shame brought to their family when they are finally abandoned by their husbands as a result of health complications shown above, or even where they are subjected to various forms of domestic violence by their older husbands. Similarly such girls are deprived of the opportunities of education as granted to their male counterparts. They are thereafter subject to a life time of unequal bargaining power with their husbands with the possibility of violence perpetrated against them.

The need for a balancing therefore comes in here, wherein the economic needs of the family and the need to protect its honour can be attained without necessarily subjecting the girls to this practice. This approach will focus on the girls, their families, the community and the government, and culturally appropriate programs that provide families and communities with education and reproductive health services should be provided.

Furthermore, the approach should not be moral; not telling the families that they are doing something wrong, but by showing them a way in which a better future can be facilitated for their daughters, which in the long run will benefit the whole family.²¹⁰ This approach will also include integrated education, health, economic and

²⁰⁹ Lydersen (op cit note 202).

²¹⁰ Lydersen (op cit note 202).

participatory community development programmes.²¹¹ Thereafter, the communities will gradually see the need to end the practice as a better end is serving their means.

4.4 Bride price/wealth

4.4.1. Definition

This is another institution widely practiced in Africa, which also brings out the tension between culture and women's human rights in Africa. Bride price is a collective name used to refer to various gifts, property, etc. given by the prospective bridegroom and/or his family to the family of the bride-to-be in consideration of marriage, which either is yet to take place or has taken place.²¹²

This practice has different functions in different societies and may have several in the same society: to indemnify the girl's family for the loss of her services, as a sign of good intentions on the part of the groom and his family, to solidify the new affinal bonds created by marriage and to legitimize children born to the union.²¹³

4.4.2. Forms of the practice

The practice traditionally involved the exchange of gifts which included livestock and cattle. For example, in many South African societies, such as the Zulu or the Swazi, bride payments known as lobola, is in the form of cattle, which are considered to be a special wealth object which is restricted to a few highly prominent social transactions. The marriage cattle are transferred from the groom or his family to the bride's father or brother. However, the recipient of the payment does not fully assume the right to dispose of the animals involved. If his daughter fails to bear children or becomes divorced, he must return them to his former in-laws.

In other areas special valuable shells or stones are exchanged.

²¹¹ Lydersen (op cit note 202).

²¹² Benedek (op cit note 141 at 280).

²¹³ 'Examining Bride Wealth' available at africafocus.library.wisc.edu [accessed 18 February 2008].

4.4.3. *The rights it violate*

The practice has primarily been criticised for discriminating against women, on grounds that it treats them like property.²¹⁴ In addition to fact that the price charged for the bride has increased enormously, the whole thing has become commercialised thus promoting elopement, cohabitation, domestic violence, unfaithfulness and divorce.²¹⁵

It also criticised for violating women's rights to dignity, to protection from violence and inhuman and degrading treatment. Women and girls in abusive relationships are consequently bound to remain in such abusive marriages if their parents are unable or are not willing to refund the bride price.²¹⁶

The cultural impact of bride price has also been seen as a contributing factor to the spread of AIDS, and this again violates their right to life and health. Many women stay in unfaithful marriages, even when faced with the threat of the disease, as they cannot afford to return the bride price paid on them at the time of marriage.

4.4.4. *Cultural Justifications for the practice*

Bride wealth paid at marriage has different functions in different societies and may have several in the same society. First, most people feel obliged to pay it because they want to fulfil their customary obligations. In patrilineal societies, the handling over of the bride price represents the transfer from one family to another of the rights over the productive and reproductive capacities of a woman.²¹⁷

Secondly, the payment of bride price is intended to seal the marriage and symbolize the union of two families. However, it is now seen as the purchase of a wife.²¹⁸ Because of his proprietary rights over the wife, even when a husband dies, one of the husband's relatives inherits the woman; her refusal means that her family must return

²¹⁴ Alice Emasu 'Uganda: Bride Price – Can Abolition End Violence Against Women?' available at E:\allAfrica_comUgandaBridePrice-CanAbolitionEndViolenceAgainstWomen.mht [accessed 19 February 2008].

²¹⁵ T W Bennet *Sourcebook of African Customary Law* (1991) at 196-202.

²¹⁶ Emasu (op cit note 213).

²¹⁷ See A. Lawson 'Women and Aids in Africa: Sociocultural Dimensions of the HIV/AIDS Epidemic' (1999) Vol. 29 *International Social Science Journal* 393.

²¹⁸ Bond (op cit note 13 at 212).

the bride price. Because the woman's productive capacity is not her own, but her father's or her husband's she cannot claim any property.²¹⁹

Thirdly, it is supposed to compensate the girl's family for the loss of her services,²²⁰ and is also seen as a sign of good intentions on the part of the groom and his family, to solidify the new affinal bonds created by marriage, and to legitimize children born to the union.²²¹

The bride price system has however been problematic for several reasons. It is a requirement that, for a woman to leave a marriage, even a bad or abusive one, her parents must return the dowry money. Where they are unable to so do, the woman cannot escape such a marriage. This practice has evidently, reinforced the notion that men possess women. In addition, young men often delay marriage, because they do not have the financial means to provide the dowry. This results in increased cohabitation in which women have no rights.

4.4.5. Resolving the Conflict

Bride wealth is practised extensively in Africa, and an attempt to abolish it by legislation could well interfere with traditional means of protecting a woman from abuse by her husband. And yet as clearly shown above, this means of protection equally operates to the disadvantage of the women in these marriages. Although several justifications are given for the practice, it is evident that a number of these reasons have fallen by the way side. An example that easily comes to mind is the justification that the practice joins two families. In recent times, bride price is increasingly seen as a payment to either the father of the bride, or if the father is dead, then the brother of the bride. It is no more seen as a payment made to the clan, but to the individual, this show that the practice in no way serve to necessarily join families together. The increase in the price is yet another problem in issue.

However, because dowry plays an important role in maintaining most African cultural tradition, communities will resist legal restrictions of this practice and circumvent

²¹⁹ Bond (op cit note 13 at 212).

²²⁰ Benedek (op cit note 141 at 281).

²²¹ George Dalton 'Bridewealth' vs 'Brideprice' (1966) 68 *American Anthropologist* 732-738.

regulation by increasing the value and number of gifts.²²² The sensible legal course to take would probably be not to abolish the practice outright, but merely to ensure the right of any woman not to be subjected to the practice if she chooses otherwise.²²³ The law could require that both families provide gifts, and also attempt to abolish dowry refund as it puts the woman in a vulnerable position. Similarly, the government and women's rights advocates should conduct widespread education on the negative effects of exorbitant dowries.²²⁴ Thereby easing the means for refund by the woman and her family, if the need so arises.

5. CONCLUSION

It has been highlighted that some traditional practices violate women's rights and the force of culture has been a major constraint on their elimination. It has also been demonstrated that culture remains a strong force, quite often militating against the eradication of the harmful aspects of these practices. It has also been shown that a harmful traditional practice may violate several rights at the same time.

While culture may have its negative side it does have its positive sides as a way of life of a given group, and represents identity, beliefs, norms, values, and acceptable behaviour. However, the proponents of cultural rights should not assert them at the expense of women's rights. As shown above, there are other aspects of culture that the community can continue to enjoy without jeopardizing the enjoyment of women's minimum human rights.

Appreciating this tension and interrelationship is the starting point for initiating sustainable change, which will ensure not only that women enjoy their rights, but that they can do so as members of their communities. This can be achieved by working hand in hand with the community to isolate and eradicate the harmful aspects of a ritual or practice, while retaining and promoting its positive aspects associated with the communities' value systems.

²²² Bond (op cit note 13 at 215).

²²³ Howard (op cit note 115 at 198).

²²⁴ Howard (op cit note 115 at 198).

The African Women's Protocol has been praised for addressing quite specifically the peculiar situation of women in Africa. Though criticised from varying angle, the next chapter aims to discover if the protocol has gone a long way in achieving this balance required for an effective provision for a better status for women in Africa.

CHAPTER FOUR

THE AFRICAN UNION PROTOCOL ON WOMEN'S RIGHTS IN AFRICA: A NEW HOPE FOR AFRICAN WOMEN?

1. INTRODUCTION

The previous chapter has attempted to show the need to appreciate the tension and interrelationship between the requirements of human rights and the needs of culture, which it is believed will be the starting point for initiating sustainable change, which will ensure not only that women enjoy their rights, but that they can do so as members of their communities.

The African Women's Protocol was therefore drafted so as to address some of the specific problems of women highlighted in the previous chapter.²²⁵ It addresses a broad range of human rights concerns of African women through creative, substantive and detailed language. It is the first instrument to be developed by Africans for women in Africa and it came into force on November 25, 2005, after having been ratified by 15 African governments.²²⁶

The significance and potential of the African Women's Protocol go well beyond Africa.²²⁷ It advocates for an approach in protecting women's rights, which recognises the fact that equality between men and women is impossible unless certain traditional and cultural beliefs, attitudes and stereotypes are corrected. It also contains a number of global 'firsts'. For example, it represents the first time that an international human rights instrument has explicitly called for the prohibition of harmful practices such as female circumcision/female genital mutilation (FC/FGM), which has ravaged the lives of countless young women in Africa.²²⁸

²²⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003.

²²⁶ As of February 17, 2006, Benin, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo had ratified the Protocol.

²²⁷ Centre for Reproductive Rights 'The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights' (Feb 2006) available at www.reproductiverights.org [accessed 2nd February 2008].

²²⁸ Ibid.

There is therefore a need to critically analyse some of the provisions of the African Women's Protocol that addresses the position of women in African culture and the effect of the cultural practices and norms as discussed above. The chapter also attempts to analyse if the African Women's Protocol successfully escapes the extreme forms of the 'Western notions' or 'African perspectives' of women's rights,' and tries to proffer suggestions on how the Protocol can be utilised to better protect and empower the African women it targets. It concludes by nonetheless applauding the regime of the African Women's Protocol in providing a framework that can be utilised.

2. REASONS FOR ITS ADOPTION

Although the African Charter on Human and Peoples' Rights is the primary treaty providing a framework for human rights in the region, and contains provisions protecting women from all forms of discrimination,²²⁹ its provisions on women's rights were largely seen as ineffective and inadequate.²³⁰ This is primarily due to the African Charter's apparent juxtaposition of women's rights on the one hand with family rights, individual duties with African customs on the other hand. This has led some scholars to argue that the African Charter places women's rights in a legal coma²³¹ and 'reinforces outdated stereotypes about the proper place and role of women in society'.²³² This argument is so because of the realities in Africa, where most discrimination against of women takes place in the private sphere of the family which are reinforced by traditional norms and cultural values.²³³ Moreover, it is clear that women's rights may often conflict with traditional values and customs that the African Charter so clearly seeks to promote and uphold.

²²⁹ For example Article 2, 18(3) of the African Charter.

²³⁰ Centre for Reproductive Rights (op cit note 227).

²³¹ See remarks by Hhadija Wlmadmad quoted in W Benedek and W Heinz *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of the Conference* ((1992) 17. See also Chirwa (op cit note 10 at 68).

²³² C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Pennsylvania State Law Rev* 679 at 687.

²³³ F N Adjtey 'Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture' (1995) 44 *American University Law Review* 1356.

The African Women's Protocol was consequently adopted principally to reinforce the provisions of the African Charter on Human and Peoples' Rights, which were considered as lending insufficient protection to women's rights.²³⁴ It does so by adding rights that were supposedly missing from the charter, and by attempting to clarify governments' obligations with respect to women's rights.²³⁵ Another reason that informed the adoption of the African Women's Protocol is apparent in its Preamble, which is to the effect that the African Women's Protocol was intended to serve as a reminder of the states' obligations in relation to women's rights.²³⁶

The following section will critically examine the key provisions of the African Women's Protocol that addresses controversial issues around women in the family and in African cultural societies as discussed in the previous section, with the aim of investigating if the African Women's Protocol was able to successfully achieve a balance between the various debates on women's human rights in Africa.

3. KEY PROVISIONS OF THE AFRICAN WOMEN'S PROTOCOL

The Protocol addresses specific problems and issues that have significantly hindered African women's rights and well – being in the past. It also specifically name and address some cultural patterns and practices that have raised a lot of criticisms both regionally and internationally. This part is however concerned with the African Women's Protocol's approach in addressing the claim for the rights of women, together with their cultural identity. The African Women's Protocol's approach to some practices discussed in the previous chapter will also be analysed.

Article 2 Elimination of discrimination against women

The African Women's Protocol enjoins States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. States Parties are obliged to take positive (affirmative) actions in those

²³⁴ M S Nsibirwa 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1(1) *African Human Rights Law Journal* 40 at 41.

²³⁵ The protocol responds to the 'need to reinforce Article 18 (of the Charter) with a more elaborate rendering of the respect for women's human rights.' J Oloka-Onyango 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 *Buffalo Human Rights Law Review* at 39, 66.

²³⁶ Chirwa (op cit note 10 at 71).

areas where discrimination against women in law and in fact continues to exist, and modify the social and cultural patterns of conduct of men and women through specific actions (such as public education, with a view to achieving the elimination of harmful cultural and traditional practices).²³⁷

Article 3 Right to dignity

This article recognises a very important right for women, especially in the African context. It provides that every woman has ‘the right to dignity inherent in a human being’ and ‘to respect as a person and to the free development of her personality.’ This provision underscores the fact that women are independent human beings who deserve respect and can exercise and claim their rights independently or in association with others.²³⁸ It also seeks to reform social and cultural traditions and practices and create a common civil code that upholds the dignity of women as equal partners with men in society.

Article 4 Violence against women

This article posits that every woman is entitled to ‘respect for her life and the integrity of her person.’ The African Women’s Protocol goes beyond existing global and regional treaties by affording specific legal protection against gender-based violence, in both the public and private sphere, including domestic abuse and marital rape.²³⁹ In addition, the African Women’s Protocol is unique in its express guarantee of women’s right to be protected from threats of both physical and verbal violence.²⁴⁰ As an aspect of the right to life, integrity and security of the human person, States Parties are required, among others, to enact and enforce laws to prohibit all forms of violence against women (including unwanted or forced sex, whether the violence takes place in private or public); to adopt necessary measures to ensure the prevention, punishment and eradication of all forms of violence against women; and to punish the perpetrators of violence against women, while rehabilitating the victims.²⁴¹

²³⁷ Kaniye Ebeku ‘A New Hope For African Women: Overview of Africa’s Protocol on Women’s Rights’ (2004) 13(3) *Nordic Journal of African Studies* 266. Article 1 (f) of the Protocol.

²³⁸ Chirwa (op cit note 10 at 75)

²³⁹ Art 1(j) and Art 3(4) of the African Women’s Protocol.

²⁴⁰ Centre for Reproductive Rights (op cit note 227 at 9).

²⁴¹ Article 4 of the African Women’s Protocol.

Article 5 Elimination of harmful practices

The African Women's Protocol obligates States Parties to prohibit, condemn and take all necessary legislative and other measures to eliminate all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. such practices, including the creation of public awareness about the adverse effects of harmful practices, and the prohibition through legislative measures backed by sanctions, of all forms of FGM, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.²⁴²

Article 6 and 7 Rights within marriage and family

The African Women's Protocol lays down two requirements for marriage. Article 6(a) clearly specifies 18 as the minimum age of marriage, affirming girls' and women's right to be protected from child marriage,²⁴³ and also provides that women and men should enjoy equal rights and be regarded as equal partners in marriage. It further provides that marriage will take place only with the full consent of both parties. It also provides for freedom from forced marriage and other discriminatory practices during and upon the dissolution of marriage.²⁴⁴ It requires that every marriage be recorded 'in writing and registered in accordance with national laws, in order to be legally recognised.'²⁴⁵

The African Women's Protocol identifies monogamy as the 'preferred form of marriage',²⁴⁶ while at the same time protecting the rights of women in polygamous marriages.

Article 8 Right to equality

The African Women's Protocol makes it clear in the Preamble that it aims to reaffirm the principle of 'promoting gender equality.'²⁴⁷ This provision complements that on non-discrimination, by guaranteeing the right of equality between women and men before the law and the right to equal protection and benefit of the law. It also

²⁴² Art 5(b) of the African Women's Protocol.

²⁴³ Art 6(b) of the African Women's Protocol.

²⁴⁴ Centre for Reproductive Rights (op cit note 227 at 13).

²⁴⁵ Art 6(d) of the African Women's Protocol.

²⁴⁶ Art 6 (c) of the African Women's Protocol.

²⁴⁷ See para 9.

addresses a pivotal issue surrounding justice for women oppressed by the traditional leaders and cultural practices, by affording them a way out. This it does by requiring that States Parties ensure that at all levels, women are equally represented in the judiciary, effective access by women to judicial and legal services including legal aid, support initiatives aimed at providing women with such services, promoting the rights of women, and reform existing discriminatory laws and practices. Therefore, the undertaking to ensure that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights' is particularly relevant to the protection of women in disputes involving customary laws, and will therefore offer alternatives to women in abusive marriages.

Article 14 Health and reproductive rights

The African Women's Protocol is the first legally binding human rights instrument to expressly articulate women's reproductive rights as human rights, and to expressly guarantee a woman's right to control her fertility.²⁴⁸ It is also the only treaty to specifically address women's rights in relation to HIV/AIDS, and to identify protection from HIV/AIDS as a key component of women's sexual and reproductive rights. It also articulates a state's duty to protect girls and women from practices and situations that increase their risk of infection, such as child marriage, and FC/FGM.²⁴⁹

Article 17 Right to a positive cultural context

The African Women's Protocol provides that 'women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.'²⁵⁰ States have the obligation in relation to this right to 'enhance the participation of women in the formulation of cultural policies at all levels.'²⁵¹ In this respect, the African Women's Protocol makes clear that the legal protection of tradition ends where discrimination against women begins.²⁵²

However, as clear and as explicit as the African Women's Protocol's provisions may seem, one may be tempted to come to the conclusion that women in Africa could

²⁴⁸ Article 14 of the African Women's Protocol.

²⁴⁹ Article 5-6, 11 African Women's of the Protocol.

²⁵⁰ Article 17(1) African Women's of the Protocol.

²⁵¹ Article 17 (2) African Women's of the Protocol.

²⁵² Centre for Reproductive Rights (op cit note 227 at 11).

enjoy no better protection than that accorded by the African Women's Protocol. Nevertheless, a critical assessment of the wordings of the African Women's Protocol, together with an appraisal of some of its provisions and the protection accorded, will reveal that African women should not yet let out a breadth of relief. More work still needs to be done.

4. A CRITICAL ANALYSIS OF THE PROTOCOL AND ITS RELEVANCE TO WOMEN IN AFRICA

The African Women's Protocol can be praised as an instrument that has created the appropriate legal environment to enable equity and equality to be realised for the African woman.²⁵³ In its bold challenge of some behaviours and traditions, it has brought to fore many critical issues that have hitherto been left unresolved in the private sphere. However, the protocol may also be said to have set out goals that are difficult to attain, and the end result would be that the African Women's Protocol would become yet another addition to the existing body of human rights instruments meant rather for academic discourse than for practical enforcement. The issue of child marriage is an example. It is difficult to outlaw child marriages, especially once girls reach the age of puberty, without providing a viable alternative for the girls and the families to which they belong. A critical analysis of its protections will therefore afford an insight into the relevance of the instrument and its viability to better promote respect for women and protection from the harmful dictates of culture.

4.1 Critical issue A- Its socio-cultural relevance

The African Women's Protocol in framing its protection, takes on an individualistic perspective, which has been greatly criticised as being western in nature. This it primarily does by avoiding mentioning the word 'family' in all its provisions except in two.²⁵⁴ It has thus been criticised for ignoring rights and responsibilities of the family as a whole and its interdependence one on another. It does not also address the

²⁵³ Janah Ncube 'Africa: Fast Tracking to Women's Equality' (Feb 8 2007) available at www.allAfrica.com accessed 5th February 2008.

²⁵⁴ See Art 6(i) of the African Women's Protocol, relating to the responsibility of a man and a woman to safeguarding the interests of the family and Art 14(1)(g) on the right to family planning.

notion of individual duties that as so far been core to the African concept of human rights.

However, when viewed from the perspective of the drafters of the African Women's Protocol, it can be said to have been necessary for the idea of personal autonomy to be emphasised, so as to clearly address the oppression of individual women within the family unit where women's human rights are frequently violated through domestic violence, restriction on access to resources and in matters of marriage, divorce and property rights.²⁵⁵ Where the identities of women are brought under the rights of the family unit, it would be much more difficult to control any form of discrimination that would be suffered by them. Though the African Women's Protocol may not have provided extensively on individual duties as in other instruments, it notwithstanding attempts to reach into the private sphere where the 'Western idea of rights' hitherto advanced, have not reached. Its failure to address duties individuals have to each other could be said to be accountable to its aim of complementing other human rights instruments already in existence in the region, thus its much emphasise on gender specific issues not yet fully covered.

The African Women's Protocol is however acclaimed for its bold and clear prohibition of harmful traditional practices. However, a closer look at the said provisions will show that the condemnation and prohibition of such practices are weighed against recognised international standards. This language of the African Women's Protocol does not allow for cultural justifications of the practices, which could herald or facilitate the cross cultural dialogues aimed for that will consequently lead to the situation being addressed. The African Women's Protocol's language and approach will instead go a long way in igniting resistance on grounds of 'Western nepotism.' A better approach, I believe would have been to condemn these practices on grounds of their negative effects on the status, lives, and health of the women it seeks to protect.

The African Women's Protocol also seems to have ignored the rights and responsibilities that members of the larger family may have in relation to the married

²⁵⁵ Fox (op cit note 81).

couple and their children and vice versa.²⁵⁶ It is my view however that the African Women's Protocol's preference to promote the rights of women within a nuclear arrangement is not unconnected with historical trend wherein extended family members 'own' the woman in a marriage setting and also dictate the standard for the life of the girl child. The ownership of the women comes with the attitude that any rightful owner would normally have towards his/her goods; the owner dictates the movement! Thus, restricting the units' level of exercising control over the girl or woman, will go along way in curbing the discriminations she is constantly made to suffer.

Furthermore, the African Women's Protocol boldly addresses the status of women in African culture and the varying effect of the patriarchal power. This it does by providing for the individual rights of women, and further providing that women have a right to live in a 'positive cultural context.' It goes further to place an obligation on states' to enhance the participation of women in the formulation of cultural policies at all levels.²⁵⁷ This provision however raises further problems. Apart from the fact that it is not clear what 'positive cultural context' means, this article appears to limit the application of this right in the public sphere and wrongly assumes that culture is created at a formal level. On the contrary, and as shown in the previous chapter, most concerns about African cultural practices and their impact on women have no direct relation to the official position or policies of the government. Rather, they stem from the practices of particular communities in the private sphere.²⁵⁸ The African Women's Protocol therefore fails in this regard to articulate the right to culture in a manner where equal protection is afforded to women's individuality and personality, thereby not promoting one right at the expense of the other.

It also protects women's equal rights within a marriage by prohibiting all forms of male dominance in the family, which results in discrimination against women. Its further provision for full consent of both parties to the marriage, upon the attainment of 18 years, is also acclaimed, as it will go a long way in addressing cases of early marriages that persists in Africa. The formulation in Article 6(a) therefore means that

²⁵⁶ Art 6(c) of the African Women's Protocol.

²⁵⁷ Art 17(2) of the African Women's Protocol.

²⁵⁸ Ibid.

child marriages, which are common in Africa, are invalid. However, it's further requirement that marriages be recorded in writing and registered in accordance with national laws in order to be valid, raises a lot of concern, as it suggests quite clearly that, failure to record a marriage may render it void or voidable.²⁵⁹

While the advantages of registration are multiple, this provision may operate to the disadvantage of many women in Africa who marry at customary law or by permanent cohabitation without obtaining a marriage certificate. It will also impose an undue burden on many people who live in rural areas to have their marriages registered, given the declining capacity of African states to provide social services to the general public in rural areas.²⁶⁰ Thus, failing to recognise a marriage legally because it is not registered constitutes a failure to respond to many African women's realities,²⁶¹ which includes low literacy levels and lack of awareness of what law exists.

Customary marriages are largely informal, and mainly entered into in places where facilities for registration do not exist. Therefore, the administrative process of registering all marriages will depend in part, on the capacity of the state to provide for the process of registering customary marriages.²⁶² In the meantime, invalidating unregistered marriages will be a punitive step that will serve to punish the people the protocol is seeking to protect, rather than the state that is failing to provide an enabling institutional framework.²⁶³

The African Women's Protocol's provision for equal protect for women in polygamous marriages, clearly shows its efforts at extending its protections to the spheres of family, community, and tradition-the areas where women are most likely to experience violations of their rights in Africa. However, the African Women's Protocol does not deal sufficiently with the rights of women in polygamous marriages. Originally, it was provided that 'polygamy shall be prohibited',²⁶⁴ a situation which was unlikely to have been easily achieved.

²⁵⁹ Chirwa (op cit note 10 at 77).

²⁶⁰ Chirwa (op cit note 10 at 77).

²⁶¹ Sibongile Ndashe Strategic Litigation: A Tool for Domesticating the Protocol in *Musa Breathing Life to the African Union Protocol on Women's Rights in Africa* (op cit note 4).

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ See article 7(c) of the African Women's Protocol.

African societies have since time immemorial had their own conceptions about the institution of marriage, and as shown in the previous chapter it has brought some good to the surplus women of marriageable ages in the continent, though it is fraught with a lot of male dominance and discrimination. However, overriding this African conception cannot simply be done, unless it can be shown that those specific requirements contravene certain specific rights.²⁶⁵

The African Women's Protocol registers one of its global 'firsts' by expressly calling for the prohibition of FC/FGM by name, and its language does not allow for a cultural defence of the practice. The African Women's Protocol's provisions on harmful practices, has therefore laid to rest arguments that customary and traditional practices can prevail over the rights of women in Africa. In this respect, the African Women's Protocol makes clear that the legal protection of tradition ends where discrimination against women begins,²⁶⁶ and it further provides that 'women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.'²⁶⁷ However, the next question will be whether a legislative outlaw of the practice is enough to bring it to an end?

The African Women's Protocol went a step further in providing for equal representation of women at various levels of justice. This is very important for women who need the recourse of justice against cultural dichotomies and stereotypes that are oppressive on her. Moreover, in most legal systems in Africa, disputes concerning customary law are resolved by magistrate's courts, which are mostly staffed by lay persons. As a result, customary law issues are decided by incompetent persons who are often not even well versed with African customary law.²⁶⁸ And this goes without saying that there is the likelihood of these lay judicial officials, enforcing the law in a discriminatory way, as their culture and tradition demands.

Therefore, ensuring that 'law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights' is also particularly relevant to the protection of women in disputes involving African customary laws. Its further

²⁶⁵ Chirwa (op cit note 10 at 77).

²⁶⁶ Centre for Reproductive Rights (op cit note 227 at 11).

²⁶⁷ Art 17(1) of the African Women's Protocol.

²⁶⁸ Chirwa (op cit note 10 at 76).

requirement that women should be represented equally in the judiciary and other law enforcement organs is equally of crucial importance, because these organs are supposed to play a pivotal role in the protection of women's rights.

4.2 Critical issue B- How the obligations imposed by the African Women Protocol addresses the balance between Universality and Relativism

Whilst recognising that the African Women Protocol has great potential in its relevance to the socio-cultural milieu to which African women belong, and in its way of bringing to fore some critical issues that have hitherto been left to the private sphere, another problem still remains unresolved.

In its definition of discrimination,²⁶⁹ the African Women's Protocol suggests that it is concerned about all forms of discrimination against women occurring both in the public and private sphere. However, its substantive provisions do not expressly impose any direct obligations on non-state actors in this regard, but imposes such duties only on states parties. Furthermore, the African Women's Protocol does not explicitly impose an obligation on State Parties to take measures to eliminate discrimination against women by any person, organisation or enterprise. This it can be said, neglects the critical issue that non-state actors are equally key players in the act of discriminating against women in Africa.

As discussed in the previous chapter, the issue of discrimination raises concerns in both the public and private spheres. Whilst recognising that states have a part to play in the eradication of discrimination against women, it is of great importance to recognise that women in Africa do suffer more discrimination in the private sphere, and therefore this obligation needs to be equally extended to non-state actors. Only then can a balance be said to have been achieved in addressing the peculiarity of African societies.

The African Women's Protocol therefore seems to be State focused without regard to non-State actors. This can be said to mean that the African Women's Protocol tends to

²⁶⁹ Art 1(f) of the African Women's Protocol.

tilt more in favour of the Western idea of human rights, by placing most obligations and duties on the State, which could reduce its relevance in the African context.

In summary, it is difficult not to side with the African Women Protocol notwithstanding the claim that some of its contents are westernized, or the fact that some of its provisions are inconsistent, unrealistic, or may be difficult to enforce. The African Women's Protocol is in my humble opinion, a radical instrument needed to set the pace for sustainable change in Africa. Though vested with some insufficiencies, the African Women's Protocol provides a strategic platform for advocates seeking to bring women's rights to the attention of citizens, organisations, governments, and policy makers throughout Africa. It recognises the role of culture and its institutions and practices, though not in explicit ways. However, if properly harnessed, it could set the pace for a better interrelationship and promotion of the Western concept with the African notion of human rights on the African continent.

However, as rich and innovative as its provisions may seem in addressing cultural issues specific to Africa, one is not oblivious of the various challenges usually raised against changes such as this. This to my mind calls for the need to find ways of balancing the call for the promotion of women's individual rights and identity as expounded by the African Women's Protocol, with the equal need for respect of cultural identity and rights.

5. BALANCING COMPETING INTERESTS

The African Women's Protocol can be said to have attempted a balance by reaching into the private spheres of the family, community, and tradition, where women are more likely than not to experience violations of their rights, dignity, and respect, in its advocating for the respect and promotion of women's universal rights. This can be seen for example in its manner of addressing the practice of polygamy. It aligns universal language of affording equal rights and protections, with the appreciation of the African environment wherein polygynous marriages are prevalent. It does not seek to abolish the practice, but promotes it however reluctantly, whilst introducing the minimum standard of equality in such marriages. The African Women's Protocol has however been shown to have failed in some respects, for example, in its abolition of

some cultural practices only on the grounds of it being contrary to recognised international standards.

It is conceded that the African Women's Protocol was not so much successful in escaping the extreme forms of the debate between the universalists' and relativists' theorists. Though it takes cognisance of some peculiarities of women, its greatest weakness lies in its manner of proffering solutions to the problems, which could be so unrealistic in some instances – for example its provision for 'the registration of a marriage for it to be valid,' or its solutions could be categorised as couching for the universalists' position. It however attains a balance by respecting the particularity of various cultures, and advocating for the observance of minimum standards of universal rights that allow for some cultural variability.

The seemingly objective requirement of balancing women's rights to equality with their identities as members of various groups is of utmost importance if a change is to be achieved in the lives of African women. These are competing claims which requires subjective considerations if a change is to be achieved.²⁷⁰ However, the problem has always been in the failure to set out the factors that must be taken into account during the balancing exercise.²⁷¹ The resolution of these contestations may lie in defining the content of individual rights in group contexts, while upholding the values of the communities in the process, thus creating a basis for some rights to prevail over others. In this approach, explanations are needed of why traditional practices and customs that are seemingly in violation of women's rights should be allowed to prevail, while certain others cannot continue.²⁷²

However, a lot of passion and energy has been invested in simply stating what the law is and what the practice should be on ground, but failure is made in realising that this is a lifestyle that has been born and ingrained in these people, and this cannot be eradicated or changed just over night. Neither can it be expected that they will simply let go of their culture for the sake of 'women's rights' that they know nothing about. There is therefore a need to strike a delicate balance in trying to establish whether a

²⁷⁰ Ndashe (op cit note 261 at 80).

²⁷¹ Ibid.

²⁷² Ndashe (op cit note 261 at 80).

practice is detrimental to the well being of these women, and hence needs to be prohibited, or whether these practices are simply alien to a group of people that are not a part of the societies where they are practiced, and hence ought to be respected. Consideration must also be given to whether reconciliation can be reached between the so called ‘Western values and practices’ and the ‘African values and practices’ that seem not to have any negative effect on those practicing it.

The delicate balance that needs to be struck when establishing whether a practice, interpreted in its context can be reconciled with fundamental rights or not, remains elusive. However, Hardee²⁷³ proposes a balancing method that emphasises the choice of laws. The system should be structured to protect harmless traditional practices as they are embraced, with women being given a meaningful role in defining those cultural practices. Built in this model is an exit door if the adherents are not happy with the cultural definitions. Once the model has been finalised, cultural choices need to be respected even if they conflict with western notions of equality.

Furthermore, though some practices may seem abstract and alien to the Western world, some level of leverage should be accorded to allow for the exercise of a ‘distinct’ lifestyle, to the extent that it does not cause harm to those subjected to it.

Viewed as a whole, the African Women’s Protocol can be seen as ground breaking in Africa. Though it is sometimes couched in languages and makes provision for some protections that seem alien to African cultures, it still embodies an African consciousness in its provisions for key cultural issues surrounding women in Africa. To benefit from it, the African Women’s Protocol should not be viewed in isolation¹⁹ but will be prudent to approach its domestication and implementation in consonance with other human rights instruments. It is critical therefore that states are encouraged to domesticate the protocol and expedite its implementation.

²⁷³ C A Hardee *Balancing acts: the rights of married women and cultural minorities in Kenyan marital law* (2004) 79.

8. CONCLUSION

No doubt, the African Women's Protocol deserves merit to the extent that it tackles explicitly some cultural and traditional issues that have long raised human rights concerns including domestic violence, female genital mutilation, and child marriages. It takes a radical approach in doing this, which can initially blur one's attention from the critical protections that it affords.

It however can be said to have achieved a balance to the extent that it reaches to the private sphere in advocating for women's rights by recognising and addressing the influence and role of culture, though not sufficiently in some cases. Looking at its provisions as a whole, one may conclude that some of its protections are quite Western, but if our focus remains on the ways in which the African Women's Protocol addresses the status of women in the family and the practices they endure, one cannot help but say that the African Women's Protocol has in some way achieved a balance between the Western and African perspective of women's rights.

In conclusion, there is no one instrument of the nature of the African Women's Protocol that can boast of providing explicitly for every area of human freedoms. The provisions of the African Women's Protocol are only expected to serve as blueprints and a guide for state and non-state actors to help give effect to the rights of women through culturally relevant and appropriate measures. Despite its imperfections, it is a potential force for freedom and justice for African women. If properly harnessed, it could serve as an effective empowerment tool for African women.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDED STRATEGIES FOR SUSTAINABLE CHANGE

1. CONCLUSIONS

The fight to entrench women's rights as human rights is not a recent one. Current documents and treaties are simply playing their part in advancing the course that had started a long time ago. It has however been shown that despite this long term struggle, women in Africa, especially those at the grassroots level, still continue to experience various forms of discrimination in the name of culture. A range of international and regional conventions and declarations have attempted to protect women's rights, including the African Charter, but they are all criticised on grounds of affording insufficient protection for women, hence the need for a gender – specific instrument – The African Women Protocol.

This essay uses the universalism and cultural relativism debate as an entry point and also as an assessment tool throughout the essay in determining the degree of the problems faced by women in Africa, and how the tackling of this debate will go a long way in determining the extent to which women in Africa can be better respected and protected. On the one hand, universal rights' advocates assert that human rights should be universal, and that all cultures should be brought under the liberation of rights, while on the other hand, cultural relativists' insist that universalizing the concept of rights will be tantamount to western imperialism. Arguments have been made to show how the debate between universalism and relativism has contributed to perpetrate a situation that has actually hindered, more than benefit the cause of human rights. There is therefore the need for universal goals and cultural sensitivities to be reconciled in the establishment of realistic strategies.

The first step should then be to view cultural relativism as mutually interactive with universalism, wherein international standards will aim just at settling key principles and norms, and national insights and experiences given room to interpret and apply these principles within their cultural contexts. This will set the pace for a balanced approach to the human rights of women, which recognises the universality of basic

human rights values, and yet the interplay between various cultural factors in the construction of human rights generally.

It has also been conceded that culture has an indelible effect in shaping individuals, and that because human nature is social, then the cultural variability of human nature will still not only permit, but will require significant allowance for some cross-cultural variations in human rights if it is going to have an utmost effect in African societies. It has also been demonstrated that within traditional African societies, women's roles and status is always inferior to that of their male counterparts. It is within these patriarchal societies that women now seek recognition and protection. Unfortunately for women culture still remains an obstacle to their aspirations.

It is clear in chapter three that culture is a major determinant in the consciousness and experiences of the community, and the need for communal recognition and honour, has been a driving force in the continual existence of some harmful practices. Though it has its negative sides, culture has also been shown to have its positive attributes which aims at offering protection to the vulnerable including young girls, women and widows. But culture's positive intentions have been shown to be somewhat rigid and unrealistic many times, and this goes a long way in suppressing the individualities of the women it seeks to protect, while consequently affecting their lives and health negatively in the long run. Though culture is a reality everywhere it can no longer be invoked to deny women their basic right

I have sought to establish whether and how particular practices may violate a woman's human rights and, if so, which rights specifically. To this end, it was incumbent to establish the reasons generally given for these practices. In carrying out this exercise, it was clear that traditional practices do not always constitute a violation of human rights, but could be misinterpreted due to its 'foreign' character.

A call was again made for a cross-cultural approach and dialogue, which will create an avenue wherein the negative and harmful aspects of the cultural beliefs and practices are isolated and eradicated, whilst retaining and promoting the positive aspects associated with the communities' value system. Where such differentiation cannot be achieved, it has been shown that an alternative approach to retaining the

cultural values can still be aimed for. This approach will then create an avenue where the fight for a better status for African women is embarked on by working hand in hand with the communities in which these practices exist, with the aim not of eradicating the cultural beliefs and norms behind the practices, but with the aim of isolating and eradicating the harmful aspects of every ritual or practice, while retaining and promoting the positive aspects associated with the communities value system.

Chapter three concludes by showing that the combination of the process of internal discourse and cross – cultural dialogue, will hopefully deepen and broaden universal cultural consensus on the concept and normative content of women’s international rights to be free from all forms of discrimination, and will create a sensitivity to the relationship between culture and identity, and not just a fight for the sole aim of forcing practising cultures to merely end their traditions, in strict compliance with international standards and beliefs.

The question that readily comes to mind now is: ‘Are we nearer to resolving the difference between the relativity and universality of human rights with respect to harmful traditional practices affecting women in Africa?’

The adoption of the African Women’s Protocol brought with it a renewed hope both for women and women rights’ activists on the continent. As clearly shown, the African Women’s Protocol advances human rights protections in Africa to better reflect and incorporate women’s experiences. This it does by reaching into the private spheres of the family, community, and tradition, where women are more likely than not to experience violations of their rights, dignity, and respect.

The African Women’s Protocol has however been shown to have failed in some respects in its manner of addressing the conflicts between culture and women’s rights. This can be clearly seen in the African Protocol’s approach of weighing traditional beliefs, standards and practices solely on the scale of ‘international standards,’ and in its manner of limiting cultural issues to the public sphere. It also does not make provision for a consolidation of the cultural justifications for the continuing

prevalence of some practices together with that of the proponents for a universal protection for women's rights.

It is also conceded that the African Women's Protocol was not so much successful in escaping the extreme forms of the debate between the universalists' and relativists' theorists. Though it takes cognisance of some peculiarities of women, its greatest weakness lies in its manner of proffering solutions to the problems, which could be so unrealistic in some instances – for example its provision for 'the registration of a marriage for it to be valid,' or its solutions could be categorised as couching for the universalists' position. It however attains a balance by respecting the particularity of various cultures, and advocating for the observance of minimum standards of universal rights that allow for some cultural variability.

It has however been shown in a final analysis that despite its flaws and weaknesses, the African Women's Protocol still provides a tremendous opportunity for women advocates in Africa, and could herald a new age for the recognition and respect of women throughout the continent.

2. RECOMMENDED STRATEGIES FOR SUSTAINABLE CHANGE

It has been submitted that human rights in theory, has a basic minimum validity and applicability regardless of communal sentiments in African society, the gender roles in African families, and African traditions or any other religiously, socially or culturally inspired factors. It has equally been submitted that culture is the primary force in the socialization of individuals and a major determinant of their consciousness. It has been made clear that a change can only be achieved, where the equal forces of culture are allowed to interrelate on the same platform as that of the universality of human rights, with the strengths of both positions evenly promoted and applied in context.

As argued above, human rights in practice have little utility as an effective means to challenge the harmful aspects of some traditional practices and beliefs or, indeed, some other forms of gender violence and discrimination. Likewise, the manner in which we encourage and expect women to use human rights to effect change, together

with our strict universal approach in the struggle for women, are largely untenable within the African context to which these women belong. Therefore, an approach that focuses on the law while ignoring culture is not likely to turn things around because these same women are the wives, sisters, daughters etc, of the men out there who the patriarchal system has placed in positions superior to women.²⁷⁴

Since women have been brought up to believe that harmful traditional practices are the natural order of things and since they are the victims of the same practices, I am of the opinion that women first and foremost, should receive education of the possibility of them living better lives. Strategies situated around a framework of human rights should be avoided as it may raise resentment even from the women themselves. Instead, the consciousness of women should be raised on the negative aspects of some these traditions and their need to improve their status, while creating room for their empowerment, which will bring about the changes needed.

Focus should also rest on respecting and promoting the positive aspects and spirit behind some traditional practices which will in the end create a sense of confidence in the people and lessen their resentment to any form of constructive change.

In the same vein, the consciousness of the men and traditional leaders should equally be raised of the negative impact of some of these practices, as knowledge by the women alone has clearly shown not to amount to any good, as societal approval and integration has proved to be a strong force behind the prevalence of most harmful cultural practices. Recognising men as an important group for change is a natural conclusion in light of the fact that African women tend to have very little authority and decision-making power to change norms and customs. Even if women are convinced of their rights to health and life and that they should not submit to a traditional practice, few will succeed to secure their rights if the decision-makers within their families and communities are not sensitized and in agreement.

Therefore ordinary men at the local level should also be involved in this process. Given that the patriarchal notion is found in most African societies, all men –

²⁷⁴ Nsirbirwa (op cit note 234)

husbands, fathers, brothers and especially adolescent boys – should be among the first targets of awareness – raising initiatives. If they are convicted of the ill effects of early pregnancy for example, fathers more than mothers may insist that their daughters marry at a latter age, since men have more power than women to deviate from the norm and set trends in a different direction

In addition, achieving gender equality in Africa will equally require specific measures that go beyond the equal treatment of women and men. It goes beyond legislative texts banning harmful practices. Such measures must address the politics, customary laws, procedures, norms, beliefs, practices and attitudes that maintain gender equality. For instance, the African Women's Protocol recognises that States and non-State actors have a part to play in the eradication of discrimination against women. It is of great importance to recognise that women in Africa do suffer more discrimination in the private sphere, and therefore this obligation needs to be equally extended to non-state actors. Only then can a balance be said to have been achieved in addressing the peculiarity of African societies.

Local NGOs and concerned groups also have a part to play in this fight. They have the advantage of authenticity, fostering legitimacy within their own cultural environments. They are also well placed to identify those elements in society which are favourable to change and carry the authority or legitimacy to engage in dialogue and campaign for the eradication of harmful practices. Moreover, because they are situated at the community level and are generally non-political, they are capable of building broad coalitions between, inter alia, human rights groups, youth groups, women, village leaders, religious communities and government.

Better infrastructures also need to be put in place, especially at the local levels, to expedite the effective realisation of some provisions of the protocol.

In a final analysis the ultimate message and approach should not be aimed at substituting Culture and its positive values with Western values, but to eliminate the extreme positions of both Cultural norms and Western precepts, and create an equal platform for their existence. Then can notes be compared and the women they both seek to promote are not tossed to and fro by the dogma of both beliefs, and thereafter

left in worse off positions than they were in before the attempt at a change commenced. The fight for women's rights and equality in Africa, should not be an all or no option, but should give room for a case for 'equity' and not just 'equality' where circumstances so demand, and where it is the most viable means of affording better protection for women in Africa.

BIBLIOGRAPHY

Covenants, Conventions, Recommendations and Resolutions

African Charter on Human and Peoples' Rights, adopted June 27 1981, OAU DOC. CAB/LEG/67/3 rev. 5, 21, I.L.M 58 (1982), entered into force Oct. 21, 1986.

Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly on 18 December 1979, entered into force on 3 September 1981.

Constitutive Act of the African Union OAU Doc. CAB/LEG/23.15 (May 26, 2001)
(transforming the Organization of African Unity into the African Union.

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003.

Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

United Nations 'Harmful Traditional Practices Affecting the Health of Women and Children' (1996) 9

Books

Adjamagbo-Johnson, Kafui *Effective Implementation of Women's Rights in West Africa* (2004) Women in Law and Development in Africa.

Alston, Philip *The Best Interest of the Child: Reconciling Culture and Human Rights* (1994) Oxford University Press.

An-Naim, Abdullahi Ahmed *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992) University of Pennsylvania Press.

An-Naim, Abdullahi *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights* (1990) Claude E Welche and Virginia Leary eds.

Balos, Beverly *Law and Violence Against Women - Cases and Materials on Systems of Oppression* (1994) USA, Carolina Academic Press.

Benedek, Wolfgang *Human Rights of Women: International Instruments and African Experience* (2002) ZED Books Ltd.

Bennett, Tom W *Human Rights and The African Cultural Tradition* (1993) Keip Publishing.

Bond, Johanna *Voices of African Women* (2004) Caroline Academic Press.

Browman, Cynthia and Kuenyehia, Akua *Women and Law in Sub-Saharan Africa* (2003) Sedco Publishing Limited.

Cassese, Antonio *Human Rights in a Changing World* (1990) Polity Press (Basil Blackwell).

Cohen, Joshua and Howard, Matthew *Is Multiculturalism Bad for Women?* (1999) Princeton University Press.

Evans, Malcom and Murray, Rachel *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) Cambridge University Press.

Fox, Diana and Hasci, Naima *The Challenges of Women's Activism and Human Rights in Africa* (1999) The Edwin Mellen Press.

Glanz, Lorraine E *Violence and Family Life in Contemporary South Africa: Research and Policy Issues* (1996) Human Sciences Research Council.

Howard, Rhoda E *Human Rights in Commonwealth Africa* (1986) Rowman & Littlefield Publishers.

Ibhawoh, Bonny *Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria* (1999) The Danish Centre for Human Rights.

Kuenyehia, Akua *Women & Law in West Africa-Situational Issues Affecting Women* (1998) Women and Law in West Africa (WaLWA).

Lindholt, Lone *Questioning the Universality of Human Rights* (1997) Dartmouth Publishing Company Limited

Mama, A *Shedding the Masks and Tearing the Veils* (1997) Engendering African Social Sciences, Dakar: CODESRIA

Murray, Christiana *Advancing Women's Rights* (1997) Juta & Co. Ltd, Cape Town

Musa, Roselynn et al *Breathing Life into the African Union Protocol on Women's Rights in Africa* (2006) Solidarity for African Women's Rights & African Union.

Nickel James *Making Sense of Human Rights* (1987) University of California Press, Berkeley, Los Angeles: London.

Opoku Kwame *The Law of Marriage in Ghana A Study in Legal Pluralism* (1976) Institut für Internationale Angelegenheiten der Universität Hamburg.

- Ouguerougou, Fatsah *The African Charter on Human and Peoples' Rights* (2003) Martinus Nijhoff Publishers.
- Packer, Corinne A *Using Human Rights to Change Tradition* (2002) Utrecht University Institute for Legal Studies.
- Pollis, Adamantia and Schwab, Peter *Human Rights: New Perspectives, New Realities* (2000) Lynne Rienner Publishers
- Peters, Julie and Wolper, Andrea *Women's rights, human rights: International feminist perspectives* (1995) Routledge.
- Ronald, Dworkin *Taking Rights Seriously* (1977) London: Duckworth.
- Rwomire, Apollo *African Women and Children: Crisis and Response* (2001) Praeger Publishers.
- Sackey, Brigid M *New Directions in gender and religion: the changing status of women in African independent Churches* (2006) Lanham, MD: Lexington Books.
- Sesay, Amadu & Odebiyi, Adetanwa *Nigerian Women in Society and Development* (1998) Dokun Publishing House.
- Stamatopoulou, Elsa *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (2007) Martinus Nijhoff Publishers.
- Steiner & Alston *International Human Rights in Context: Law, Politics, Morals* (1996) Oxford.
- Sweetman, Caroline *Women and the Family* (1996) Oxfan
- Wamue, Grace & Getui, Mary *Violence and Women* (1996) Acton Publishers
- Westendrop, Ingrid *Violence in the domestic Sphere* (2005) Maastricht Centre for Human Rights.

Westhuizen, Christi van der *Gender Instruments in Africa-Critical Perspectives, future strategies* (2005) Institute for Global Dialogue, Midrand, South Africa

Articles and Journals

Adjtey, F N 'Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture' (1995) 44 *American University Law Review* 1356.

Adrien, Katherine Wing & Tyler Murray Smith 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* at 33, 58.

Afshari, Reza 'An Essay on Islamic Cultural Relativism in the Discourse of Human Rights' (1994) 16 *Human Rights Quarterly* at 235-76.

Ajibola, B 'Problems of Human Rights and the Rule of Law' (July – Sept 1997) *Africa Legal Quarterly* 25.

Asiimwe, Jacqueline 'Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses' (2001) 4 *Yale Human Rights and Development Law Journal* at 173, 174.

Brown, Chris 'Universal Human Rights: A Critique' (1997) 1 *International Journal of Human Rights*.

Chirwa, Danwood Mzikenge 'Reclaiming (WO) manity: The Merits and Demerits of the African Protocol on Women's Rights' (2006) *Netherlands International Law Review* at 64-96.

Cobbah, Josiah A M 'African Values and the Human Rights Debate: An African Perspective' (1987) *Human Rights Quarterly* 309-331.

- Cohen, Roberta 'Human Rights in Africa: Cross-Cultural Perspectives' 15 *Human Rights Quarterly* (1993) at 459-461.
- Dalton, George 'Bridewealth' vs 'Brideprice' (1966) 68 *American Anthropologist* 732-73.
- Donnelly, Jack 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* at 400-419.
- Ebeku, Kaniye 'A New Hope for African Women: Overview of Africa's Protocol on Women's Rights' (2004) 13 *Nordic Journal of African Studies*.
- Fields, A Belden and WolfDieter, Narr 'Human Rights as a Holistic Concept' (Feb. 1992) 14 *Human Rights Quarterly* 1-20.
- Goulet, Denis 'In defense of Cultural Rights: Technology, Tradition and Conflicting Models of Rationality' (1981) 3 *Human Rights Quarterly* at 1-18.
- Howard, Rhoda 'Cultural Absolutism and the Nostalgia for Community' (1993) 15 *Human Rights Quarterly* at 315-338.
- Kofi, Quahigah 'The Philosophical Basis of Human Rights and its Relation to Africa' (1992) *Journal of Human Rights Law and Practice* vol 1 no. 3/ vol 2 nos. 1 & 2, Nigeria.
- Koroma 'The Influence of the Universal Declaration of Human Rights in Africa- Fifty Years After Its Adoption- A Legal Perspective' (1998) *Africa Legal Aid Quarterly* 6.
- Lau, Holning 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 *University of Chicago Law Review* XXX.
- Lawson, A 'Women and Aids in Africa: Sociocultural Dimensions of the HIV/AIDS Epidemic' (1999) Vol. 29 *International Social Science Journal* 393.

Mandura, M U 'Female genital mutilation in Nigeria' (2004) 84 *International Journal of Gynecology Obstetrics* at 291-298.

Nsibirwa, M S 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1(1) *African Human Rights Law Journal* 40 at 41.

Obermeyer, C M 'Female Genital Surgeries: The Known, the Unknown, and the Unknowable' (1999) Vol. 13 *Medical Anthropology Quarterly* at 79-106.

Oder, J 'Reclaiming women's social and economic rights in Africa: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2004) 5 *ESR Review* 5.

Oloka-Onyango, J 'Beyond the rhetoric reinvigorating the struggle for economic, social and cultural rights in Africa' (1995) 26 *California Western International Law Journal* 1.

Oloka-Onyango, J 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 *Buffalo Human Rights Law Review* at 39, 66.

Renteln, Alison Dundes 'Relativism and the Search for Human Rights' (1988) 90 *American Anthropologist* 58.

Tharoor, Shashi 'Are Human Rights Universal?' (1999/2000) XVI *World Policy Journal*.

Zechenter, Elizabeth M 'In the Name of Culture Cultural Relativism and the Abuse of the Individual' (1997) 53 *Journal of Anthropological Research* 320.

Pamphlets and Papers

Adjanagbo-Johnson Kafui et al 'Effective Implementation of Women's Rights in West Africa' (2004) *WILDAF/FeDDAF*.

Aina et al 'Better Life for Real?' (March 16 1990) *The African Guardian Lagos* at 19-24.

Dahabo ELmi Muse 'Poem on Female Genital Mutilation' reprinted in Lula J Hussein et al 'Female Genital Mutilation: Reports on Consultations held in Ottawa and Montreal (1995) *Department of Justice Canada*.

Francoise Nduwimana 'Universality and Cultural Relativism' (June 13 2003) *Human Rights Commission of Pakistan*.

Hope Bagyendera Chigudu 'Characteristics of a Good Wife' *ARISE*, Oct.-Dec. 1991.

Human Rights Watch 'Policy Analysis Against Women and Girls in Africa' December 2003.

Joint United Nations Programme on HIV/AIDS (UNAIDS) 2006 report on the global AIDS epidemic. Geneva, Switzerland: UNAIDS; 2006.

Preiswerk, Roy 'The Place of Intercultural Relations in the Study of International Relations' (1978) *The Year Book of World Affairs* 251.

UN Economic and Social Council '*Preliminary Report Submitted by the Special Rapporteur on Violence Against Women*' (1994) para 72.

United Nations 'Declaration of Commitment on HIV/AIDS' Document A/S-26/L.2, New York, 2001, para 59.

World Health Organization 'Female Genital Mutilation: An Overview' (1998) 6.

Internet Sources

Alice Emasu 'Uganda: Bride Price – Can Abolition End Violence Against Women?' available at E:\allAfrica_comUgandaBridePrice-CanAbolitionEndViolenceAgainstWomen.mht [accessed 19 February 2008].

Ayton-Shenker, Diana *The Challenge of Human Rights and Cultural Diversity* United Nations Background note, available at www.un.org [assessed 23rd Jan. 2008].

Centre for Reproductive Rights 'The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights' (Feb 2006) available at www.reproductiverights.org [accessed 2nd February 2008].

Hellsten, S K 'Rationalising circumcision: from tradition to fashion, from public health to individual freedom-critical notes on cultural persistence of the practice of genital mutilation' available at www.jme.bmj.com [accessed 28 January 2008].

Introduction to Africa Family, Kinship and Domestic Groupings (2007) available at <http://www.everyculture.com/Africa-Middle-East/Introduction-to-Africa-Family-Kinship-and-Domestic-Groupings.htm> [accessed 18 February 2008].

Issa Tanre Arusha 'Tanzania: Women and Polygamy – A Controversial Issue' (Jan 2008) available at <http://Africa.com/stories/2008/210535.html> [accessed 20 February 2008].

Janah Ncube 'Africa: Fast Tracking to Women's Equality' (Feb 8 2007) available at www.allAfrica.com [accessed 5th February 2008].

John Lawson 'Africa Family Structure' available at <http://www.jicef.or.jp/wahec/fu/217.htm> [accessed 18 February 2008].

Kari Lydersen: *The Injustice and Injury of Child Marriage* (2006) available at <http://www.infoshop.org/news/article.php> [accessed 21 February 2008].

Nawal M Nour 'Health Consequences of Child Marriage in Africa' (2006) *Emerging Infections Diseases* available at <http://www.cdc.gov/incidod/EID/vol12no11/06-0510.htm> [accessed 18 February 2008].

Nzwili, Frederick 'New Ritual Replaces Female Genital Mutilation' available at www.fgm.org/chelala.htm/ [accessed 28 January 2008].

The New Partnership for Africa's Development (NEPAD) (Oct. 2001) available at <http://www.uneca.org/nepad/> [assessed 5th December 2007].

WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights,' available at <http://wildaf.org.zw/news4.html> [accessed 25th December 2007].